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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DUANE MONTGOMERY,

PETITIONER,

v.

CITY OF FARMINGTON HILLS; FARMINGTON HILLS POLICE DEPARTMENT,

RESPONDENTS.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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161 pp

QUESTIONS PRESENTED

1. Whether the Michigan Statute M.C.L.A. 257.321(a) violates The Constitution of the United States, Amendment XIV [1868], section 1 or Amendment IV [1791].

2. Whether the seizure of the Petitioner's vehicle, which was NOT authorized under the Michigan Statute M.C.L.A. 257.252d, violates The Constitution of the United States, Amendment XIV [1868], section 1.

3. Whether a Michigan Police Department can be held liable for violations of The Constitution of the United States or any acts mentioned in Section 1985 of Title 42, when liability is authorized under Title 28 section 1343(a)(2) of the Judiciary and Judicial Procedure, Michigan Statute M.C.L.A. 600.2051(4) and Michigan Statute M.C.L.A. 333.20965.

PARTIES IN PROCEEDINGS BELOW

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1. (b). Cite as: 872 F.2d 418, 1989 WL 27493 (4th Cir.(N.C.))) R.D. Padgett, Plaintiff-Appellant v. Synthes, LTD, Defendants-Appellees. No. 88-3927. United States Court of Appeals, Fourth Circuit. Plaintiff R.D. Padgett appeals the orders setting aside the entry of default 9

2. (a). Cite as: 420 U.S. 103, 95 S.Ct. 854 Richard E. Gerstein, State Attorney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al. No. 73—477. Supreme Court of the United States. Petitioner, Richard Gerstein, State Attorney's petition for writ of certiorari was granted. 11

2. (b) Cite as: 1986 WL 4160 (N.D. Ill.)) Murray S. Jacobson, Plaintiff, v. State of Illinois, Attorney General's Office, Criminal Division (Neil Hartigan, Attorney General), et al. , Defendants. No. 85 C 6480, United States District Court, N.D. Illinois, E.D.. Plaintiff, acting pro se, filed this case to complain of the circumstances surrounding his arrest and conviction for driving with a suspended driver's license 11

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DUANE MONTGOMERY, Appellant in Case No. 98-1148 in the United States Court of Appeals for the Sixth Circuit, respectfully petitions for writ of certiorari to review the order of the United States Court of Appeals which dismissed the Petitioner's appeal for lack of jurisdiction of the United States District Court Eastern District of Michigan Southern Division Order Granting Respondent Farmington Hills Police Department's Motion to Set Aside Default.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is attached hereto as Appendix A-3. The District Court's Order is attached as Appendix A-5.

JURISDICTION

The Order that the Petitioner's appeal is dismissed for lack of jurisdiction was entered on April 22, 1998. The Petition for Rehearing was denied on May 21, 1998 and is attached hereto as Appendix A-7. This Court's jurisdiction to review the decision below is predicated upon 28 U.S.C. §1254(1).

As authorized under the United States Supreme Court Rule 10, the United States Court of Appeals for the Sixth Circuit has entered a decision in conflict with the decisions of the Sixth Circuit and the Forth Circuit Court of Appeals, and should be settled by this United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV [1791]
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VIII [1791]
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Michigan Statue M.C.L.A 257.321a

M.C.L.A 257.321a. Failure to answer citation or notice to appear in court, noncompliance with order or judgment, misdemeanor convictions; penalties; suspension of license; parking violations

Sec. 321a. (1) A person who fails to answer a citation, or a notice to appear in court for a violation of this act or a local ordinance substantially corresponding to a provision of this act, or for any matter pending, or who fails to comply with an order or judgment issued pursuant to section 907 is guilty of a misdemeanor. A violation of this subsection or failure to answer a citation or notice to appeal section 33b(1) of the Michigan liquor control act, Act No. 8 of the Public Acts of the Extra Session of 1933, being section 436.33b of the Michigan Compiled Laws, or a local ordinance substantially corresponding to that section shall not be considered a violation for any purpose under section 320a.

(2) Except as provided in subsection (3) and (4), 28 days or

more after the date of noncompliance with an order or judgment, the court shall give notice by mail at the last known address of the person that if the person fails to appear or fails to comply with the order or judgment issued pursuant to section 907, including, but not limited to, paying all fines and costs, within 14 days after the notice is issued, the secretary of state shall suspend the person's operator's or chauffeur's license. If the person fails to appear or fails to comply with the order or judgment issued pursuant to section 907, including, but not limited to, paying all fines and costs, within the 14-day period, the court shall, within 14 days, inform the secretary of state, who shall immediately suspend the license of the person and notify the person of the suspension by regular mail at the person's last known address.

Michigan Statue M.C.L.A 257.252d

257.252d. Immediate removal of certain vehicles from public property

Sec. 252d. (1) A police agency or a governmental agency designated by the police agency may provide for the immediate removal of a vehicle from public or private property to a place of safekeeping at the expense of the registered owner of the vehicle in any of the following circumstances:

(a) If the vehicle is in such a condition that the continued operation of the vehicle upon the highway would constitute an immediate hazard to the public.

(b) If the vehicle is parked or standing upon the highway in such a manner as to create an immediate public hazard or an obstruction of traffic.

(c) If a vehicle is parked in a posted tow away zone.

(d) If there is reasonable cause to believe that the vehicle or any part of the vehicle is stolen.

(e) If the vehicle must be seized to preserve evidence of a

crime, or when there is reasonable cause to believe that the vehicle was used in the commission of a crime.

(f) If removal is necessary in the interest of public safety because of fire, flood, storm, snow, natural or man-made disaster, or other emergency.

(g) If the vehicle is hampering the use of private property by the owner or person in charge of that property or is parked in a manner which impedes the movement of another vehicle.

(h) If the vehicle is stopped, standing, or parked in a space designated for handicapper parking and is not permitted by law to be stopped, standing, or parked in a space designated for handicapper parking.

Judiciary and Judicial Procedure Title 28 section 1343

1343. Civil Rights and elective franchise

(a) The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation , under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Michigan Statue M.C.L.A 600.2051(4)

600.2051. Capacity to sue or be sued; partnerships; unincorporated voluntary associations; corporations; state; governmental units;

Sec. 2051. (4) Actions to which this state or any governmental unit, including but not limited to a public, municipal, quasi-municipal, or governmental corporation, unincorporated board, public body, or political subdivision is a party may be brought by or against such party in its own name, or in the official capacity of an officer authorized to sue or be sued in its behalf, except that an officer of the state or any such unit shall be sued in his official capacity for the purpose of enforcing the performance by him of an official duty…;

Michigan Statue M.C.L.A 333.20965

333.20965. Liability for acts or omissions

Sec. 20965. (1) Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, or medical director of a medical control authority or his or her designee while providing services to a patient outside a hospital, or in a hospital before transferring patient care to hospital personnel, that are consistent with the individual's licensure or additional training required by the local medical control authority do not impose liability in the treatment of a patient on those individuals or any of the following persons:

(a) The authorizing physician or physician's designee.

(b) The medical director and individuals serving on the advisory body of the medical control authority.

(c) The person providing communications services or lawfully operating or utilizing supportive electronic communications devices.

(d) The life support agency or an officer, member of the staff, or other employee of the life support agency including,

but not limited to, an ambulance operation operating under an ambulance operation upgrade license issued under section 20920(7) to (12). [FN1]

(e) The hospital or an officer, member of the staff, nurse, or other employee of the hospital.

(f) The authoritative governmental unit or units.

(g) Emergency personnel from outside the state.

REASON TO GRANT CERTIORARI

Petitioner respectfully requests that the Court exercise its discretion to review the judgement of the Sixth Circuit Court of Appeals. The Court of Appeals decision conflicts with the United States Court of Appeals, Sixth Circuit acceptance of the appeal of **Dormas Russell v. Newton Luckett and John Roution, in case number 91-5575 (see Appendix A-8)**, and, United States Court of Appeals, Fourth Circuit acceptance of the appeal from **R.D.Padgett v. Synthes, LTD., in appeal case number 88-3927 (see Appendix A-18)**. In which both cases sought review of the District Court Orders to Set Aside a Default.

On August 11, 1997, the District Court issued an additional Order Granting the Respondents' Motion for Summary Judgment *(see Appendix A42)*. The Petitioner prays this Court to grant equal and fair justice and allow the Petitioner's complaint to proceed to trial by jury.

STATEMENT OF PROCEEDINGS AND FACT

A. Proceedings Below

As a result of a warrantless arrest based on information from the Law Enforcement Information Network, and the illegal search and seizure of the Petitioner and property on November 20, 1997, the Petitioner filed a civil complaint, on November 25, 1997, against the City of Farmington Hills and the Farmington Hills Police Department for violation of the

Sixth, Eighth and Tenth Amendments of the United States Constitution.

The Farmington Hills Police Department was served with a copy of the summons and complaint on November 26, 1997. The Petitioner filed a request for Entry of Default on December 16, 1997. The Clerk's Entry of Default was entered on December 18, 1997 against the Farmington Hills Police Department.

On January 5, 1998, the Respondent filed a Motion to Set Aside Default. On January 14, 1998, the motion hearing was held. On January 26, 1998, the District Court entered an Order Granting Respondent Farmington Hills Police Department's Motion to Set Aside Default. On February 17, 1998, the Petitioner filed an appeal with the Court of Appeals for the Sixth Circuit seeking review of the District Court's Order.

On March 18, 1998, the Petitioner's appeal was held in abeyance pending the disposition of the Respondent's motion to dismiss appeal for lack of jurisdiction. On April 22, 1998, the Court of Appeals for the Sixth Circuit Order the appeal of the Petitioner to be dismissed for lack of jurisdiction. The Petitioner then filed a petition for rehearing. On May 21, 1998, the Court of Appeals for the Sixth Circuit issued an Order that the petition for rehearing be denied.

B. FACT STATEMENT - DISTRICT COURT

In the OPINION and ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT dated August 11, 1998, the District Court determined that the Petitioner filed a *pro se* complaint on November 25, 1997, which asserted that defendants violated his rights under the Fourth, Sixth, and Eighth Amendments to the United States Constitution. There is no genuine issue as to any material fact and that the Defendants are entitled to a judgment as a matter of law.

The District Court determined Petitioner was stop by the Defendants because of an improperly displayed license plate on November 20, 1997. Petitioner produced valid registration for the vehicle and a valid Ohio driver's license and denied the suspension of the Petitioner's Michigan driver's license on November 20, 1997.

The District Court determined Petitioner's Michigan driver's license had been suspended for unpaid traffic tickets. Petitioner was arrested for driving on a suspended Michigan driver's license on November 20, 1997. Petitioner arrest in November of 1997,was based on information from the Law Enforcement Information Network ("LEIN"). The Defendants impounded the Petitioner's vehicle and then conducted an inventory search of the Petitioner's vehicle and found two handguns on November 20, 1997.

The District Court determined Petitioner advised the Respondents, at time of arrest, that Petitioner was a diabetic and that the Petitioner needed insulin on November 20, 1997. Petitioner was transferred to hospital, for treatment of injuries on November 20, 1997. Petitioner notified Defendants of the Petitioner need to return to the hospital for an insulin shot on November 20, 1997. Petitioner acknowledges that he was treated for pain related to his diabetes on November 20, 1997.

The District Court determined Municipalities are "persons" subject to suit under § 1983. A municipality can be held directly liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."

The District Court determined Petitioner must "identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy." Petitioner seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a Petitioner's rights must demonstrate

that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences."

The District Court determined Petitioner has produced no evidence showing that Defendants failed to train its officers with respect to providing prisoners with medical treatment or that the lack of such training amounted to deliberate indifference. Petitioner has failed to produce evidence showing a policy of targeting African Americans.

ARGUMENTS IN SUPPORT OF PETITION

I(a). Cite as: 958 F.2d 372, 1992 WL 51474 (6th Cir.(Ky.)))

Dormas RUSSELL, Plaintiff-Appellant v. Newton LUCKETT and John Roution, Defendants-Appellees. No. 91-5575. United States Court of Appeals, Sixth Circuit. Plaintiff Dormas Russell appeals the orders setting aside the entry of default... .

I(b). Cite as: 872 F.2d 418, 1989 WL 27493 (4th Cir.(N.C.)))

R.D. Padgett, Plaintiff-Appellant v. Synthes, LTD, Defendants-Appellees. No. 88-3927. United States Court of Appeals, Fourth Circuit. Plaintiff R.D. Padgett appeals the orders setting aside the entry of default.... .

On April 22, 1998 the United States Court of Appeals, Sixth Circuit entered an Order that the appeal of the Petitioner be dismissed for lack of jurisdiction over the United States District Court Eastern District of Michigan Southern Division's Order setting aside entry of default. However, the Court of Appeals for the Sixth Circuit has abused its discretion by not considering the fact that the United States Court of Appeals, Fourth Circuit had accepted

an appeal of a district court' order setting aside an entry of default from R.D. Padgett. Also, the United States Court of Appeals, Sixth Circuit had accepted a similar appeal from Dormas Russell. With the acceptance of these two appeals, one must conclude that the United States Court of Appeals does in fact have jurisdiction of appeals from order setting aside an entry of default.

The District Court did abuse its discretion in Ordering "Entry of Default To Be Set Aside". By granting the Farmington Hills Police Department motion, the District Court discretion was prejudicial to the Petitioner, by allowing the Farmington Hills Police Department immunity from any violation of the United States Constitution and prevents the Petitioner from seeking any further action or relief, against the Farmington Hills Police Department, Farmington Hills, Michigan Oakland County.

The Court of Appeals has jurisdiction over the subject matter of this appeal, because the Petitioner objects to the District Court determination of the liabilities of the Respondents, as authorized under Title 28 section 1292 of the Judiciary and Judicial Procedure. The District Court used the Respondent's claim of non-entity status as cause for setting aside the default. This legal entity status targets the liabilities of the parties and the rights of the Petitioner to recover from the Respondents. Since the District Courts justified its order based on liabilities, the Court of Appeals has jurisdictions of appeal.

The basic requirements for a pleading are set out in Fed. R. Civ. P. 8(a) and outline the requirements for "a short and plain statement of the claim showing that the pleader is entitled to relief ...". In consideration of Fed. R. Civ. P. 12(b), the court must accept as true all factual allegations in the complaint. **Windsor v. The Tennessean**, 719 F.2d 155, 158 (6th Cir. 1983), cert. Denied, 469 U.S. 826, 105 S.Ct. 105, 83 L.Ed.2d 50 (1984). Under Fed. R. Civ. P. 12(a) "a Respondent shall serve an answer within 20 days after being

served with the summons and complaint". The complaint filed by the Petitioner clearly charges the Respondents with multiple violations of the United States Constitution .

Finally, the District Court abused its discretion by relying on the McPherson v. Fitzpatrick case law in the Distric Court's Order granting Respondents' motion to set aside default (see Appendix A-5). The McPherson v. Fitpatrick cites "*A municipal department, board, or commission, such as the Detroit Police Department, is unable to raise funds for payment ...*" . However in the case of the Respondent, the Farmington Hills Police Department has raise funds in the past with the Respondent acceptance of grant funds from the United States Department of Justice (see Appendix –A112).

II(a). **Cite as: 420 U.S. 103, 95 S.Ct. 854**

Richard E. Gerstein, State Attorney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al. No. 73—477. Supreme Court of the United States. Petitioner, Richard Gerstein, State Attorney's petition for writ of certiorari was granted.

II(b). **Cite as: 1986 WL 4160 (N.D. Ill.))**

Murray S. Jacobson, Plaintiff, v. State of Illinois, Attorney General's Office, Criminal Division (Neil Hartigan, Attorney General), et al. , Defendants. No. 85 C 6480, United States District Court, N.D. Illinois, E.D.. Plaintiff, acting pro se, filed this case to complain of the circumstances surrounding his arrest and conviction for driving with a suspended driver's license.

In the Opinion and Order granting the Respondents' motion for Summary Judgment, on August 11, 1997, the district court concluded that the complaint filed by the Petitioner was a *pro se* complaint. *Such complaints must be*

construed liberally, and held to "less stringent standards than formal pleadings drafted by lawyers." **Haines v. Kerner**, 404 U.S. 519, 520 (1972). "*Allegations set forth by plaintiff in other documents are to be considered part of the complaint.*" **Matzker v. Herr**, 748 F.2d 1142, 1148 n. 5 (7th Cir. 1984). I pray that this Court will enforce this less stringent standard of review. This enforcment by this Court will ensure equal and fair access to our court system by all persons,.regardless of financial resources.

The District Court did abuse its discretion in Ordering/Granting "Entry of Default To Be Set Aside" and "Summary Judgments. The District Court failed to applied a less stringient standard of review and failed to consider all other documents and briefs submitted by the Petitioner. The briefs and other documents submitted by the Petitioner does contain the proven elements, the existents of many genuine issues as to any material fact and that the Respondents are NOT entitled to a judgment as a matter of law.

The District Court has accepted the fact, in the November 20, 1997 arrest of Petitioner, that the Petitioner was arrested by the Respondents based on information and without a warrant. The District Court has also accepted the fact that the Petitioner was arrested for driving with a suspended Michigan Driver's license. Furthermore, the District Court has accepted the fact that the Petitioner produced a valid Ohio Driver's license to the Respondents, challenging the suspension of the Petitioner's Michigan license. Finally, the District Court has also accepted the fact that the Respondents were acting under Michigan Statue M.C.L.A 257.321a.

The District Court has abuse its discretion by not considering the fact that the arrest of the Petitioner was a warrantless arrest based on information. No other information appears on the record showing that there was any probable cause to arrest the Petitioner or seizure of the Petitioner's property. The District Court must consider the opinion of Justice Powell which held that "*standards and procedures for*

arrest and detention are derived from the Fourth Amendment and its common-law antecedents, that such Amendment requires a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following arrest, and that the Florida procedure whereby a person arrested without a warrant and charged by information may be jailed without an opportunity for probable cause determination is unconstitutional." (see Cite as: 420 U.S. 103, 95 S.Ct. 854 Richard E. Gerstein, State Attorney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al. No. 73—477. Supreme Court of the United States).

The District Court also failed to consider the fact that the opinion of the Michigan Attorney General which found that the "*Department of State alone has power to suspend and revoke a motor vehicle operator's license and can do so only for the reasons, conditions, and circumstances set forth in section M.C.L. 257.319, 257.321, and 257.321(b).* Op.Atty.Gen. 1970, No. 4454, p. 124. . The opinions of the Michigan Attorney General and in conjunction with the opinions of Mr. Justice Powell, this Court must conclude that Michigan Statue M.C.L.A 257.321a, is unconstitutional and the enforcement of this statue is also unconstitutional.

The District Court has also accepted the fact that the Petitioner's vehicle was impouned and "inventory" searched by the Respondents as a direct result of the enforcement of Michigan Statue M.C.L.A 257.321a. The District Court must also acknowledge the fact that the "inventory" search of the Petitioner's vehicle was the result of the impoundment due to arrest. However, none of the conditions outlined in Michigan Statue M.C.L.A 257.252d, which authorizes the impoundment of the Petitioner's vehicle, existed at time of arrest.

The impounding and search of the Petitioner's vehicle was illegal and unconstitutional. There is no evidence showing there was probable cause to believe that any crime other than

driving under a suspended Michigan license, had been committed or would be committed. (see Appendix -A26). Furthermore, the Respondents violated the Sixth Amendment due to the seizure of the Petitioner's vehicle in violation of M.C.L. § 257.252d.

Review of the testimony of the arresting officer (see Appendix-A63), will show that the Petitioner's vehicle was not in such a condition that the continued operation of the vehicle upon the highway would constitute an immediate hazard to the public. The Petitioner's vehicle was not parked or standing upon the highway in such a manner as to create an immediate public hazard or an obstruction of traffic. The vehicle was not parked in a posted tow away zone.

The Respondents did not have reasonable cause to believe that the Petitioner's vehicle or any part of the vehicle was stolen. The Respondents did not seized the Petitioner's vehicle to preserve evidence of a crime, nor was there reasonable cause to believe that the vehicle was used in the commission of a crime. Seizure of vehicle was not necessary in the interest of public safety because of fire, flood, storm, snow, natural or man-made disaster, or other emergency.

The Petitioner's vehicle was not hampering the use of private property by the owner or person in charge of that property or was parked in a manner which impedes the movement of another vehicle. The Petitioner's vehicle was not parked or standing in a designated handicapper parking space.

The District Court had accepted the fact that the Petitioner repeatly requested to the Respondents, the Petitioner's need for diabetic INSULIN during the arrest and during the detainment of the Petitioner. However, the District Court abused its discretion by concluding that the Petitioner acknowledges that he was treated for pain related to his diabetes. The Respondents' own statement show that the Petitioner requested insulin and that the treatment at the

hospital did not include the requested diabetic insulin.(see Appendix -A26 and A34).

The District Court abused its discretion by not considering the fact that the Respondents statetment that *"HE WOULD BE FINE IF HE HAD AN EXTRA BLANKET"* (see Appendix –A34) debutes the claim of the Petitioner, that the Respondents were requested at 10:11p.m. by Kathryn Montgomery, at 11:59 p.m. and 12:01 a.m. by Doris Hill, at 12:04 a.m. by Lisa Nieves and at 12:19 a.m. by Desha Hill, that the Petitioner was experiencing pain and required diabetic insulin. (see Appendix -A29, A30, A31, and A32). These conflict in statements raises a genuine issue as to whether the Respondents had knowledge that seizures where to occur and the power to prevent the seizure from occurring. This conflict in statements also raises the genuine issues as to whether the Respondents' refusal to allow the Petitioner to take his insulin amounted to a "deliberate indifference".

The District Court has stated that a municipality can be held directly liable if the Petitioner can "*identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.*" The District Court has abused its discretion by not considering the fact that the Petitioner identifies the policy as the Michigan Statue M.C.L.A 257.321a. Furthermore, the District Court failed to consider the fact that the search of the Petitioner's vehicle was the result of an unauthorized impoundment of the Petitioner's vehicle.

In addition, the District Court failed to consider the fact that the Respondents have enforced Michigan Statue M.C.L.A 257.321a before as shown in the complaint filed by Perrion Robbins (see Appendix - A37). Which in turn connects the enforcement of Michigan Statue M.C.L.A 257.321a, to the Respondents. And finally, the police report states "*MONTGOMERY ADVISED HE IS DIABETIC AND DID NOT TAKE HIS AFTERNOON INSULIN.*" (see Appendix- A26). Had the Petitioner not been arrested under

Michigan Statue M.C.L.A 257.321a, the Petitioner would have been able to proceed home to take his afternoon insulin. Had the Petitioner been allowed to go home or take his afternoon insulin, the injuries due to the diabetic seizures would not have occurred.

For the purpose of this appeal, the facts alleged by the Petitioner and which must be accepted as true, are that: on November 20, 1997, the Petitioner, Duane Montgomery (a male African American) was stop at approximately 5:30 p.m. by the Respondent, Farmington Hills Police Department, Oakland Co. Michigan, for a non-valid license plate. However, review of the Petitioner's Michigan vehicle registration, shows that the Petitioner's vehicle was legally registered ***(see Appendix –A22).***

At the request of the Respondent, the Petitioner produced a valid Ohio drivers license ***(see Appendix- A23)***. The Petitioner was then arrested by the Respondent for driving with a suspended Michigan driver license. The Respondent then searched the Petitioner's vehicle and found two legally purchased firearms. The Petitioner then informed the Respondent, that the Petitioner had a permit to carry a concealed weapon and that a copy of the permit was on file at the Respondent's office (***see Appendix -A25***). The Petitioner, Duane Montgomery also instructed the Respondent that the Petitioner was an insulin dependent diabetic in need of insulin ***(see Appendix -A26, A27).*** The Petitioner, friends, and family members of the Petitioner attempted numerous time to convince the Respondent to allow the Petitioner to take the medically required insulin injection ***(see Appendix - A29, A30, A31, A32).***

After repeated attempts to obtain the cooperation of the Farmington Hills Police Department, the Petitioner had no other recourse but to charge the Respondents with multiple violations of the United States Constitution. Consequently, the Respondent was served with the summons on November 26, 1997 (***see Appendix –A33***). The Petitioner filed a

Demand for Entry of Default on December 16, 1997. The Clerk of Court of the District Court entered the Entry of Default on December 18, 1997. The Default was entered against the Farmington Hills Police Department under Fed. R. Civ. P. 55(b)(1). The decision to enter default lies within the district court's discretion. **Merrill Lynch Mortg. Corp. v. Narayan**, 908 F.2d 246, 250 (7th Cir. 1990). A signed return of service constitutes prima facie evidence of valid service **(see exhibit I),** "which can be overcome only by strong and convincing evidence." **Hicklin v. Edwards**, 226 F.2d 410, 414 (8th Cir. 1955), and shows that the Respondent was properly served. See also **Taft v. Donellan Jerome, Inc.**, 407 F.2d 807, 808-09 (7th Cir. 1969) ./2

To succeed in the motion to set aside default judgement under Rule 55(c) or Rule 60(b), the Respondent must show "(1) good cause for [its] default; (2) quick action to correct it; and (3) a meritorious defense to the Petitioner's complaint. "**United States v. DeMucci**, 879 F.2d 1488, 1495 (7th Cir. 1989). The same requirements, although more strictly applied, must be met to set aside a default judgment under Rule 60(b). Id., with the additional requirement of (4) respect for the finality of judgments. **Breuer, 687 F.2d** at 187. "The Respondent is required to present something more compelling than ordinary lapses of diligence or simple neglect to justify disturbing a default judgment". **North Cent. Ill. Laborer's Dist. Council v. S.J. Groves & Sons** Co., 842 F.2d 167, 167 (7th Cir. 1988); **Ben Sager Chem. Int'l v. E. Targosz & Co.**, 560 F.2d 805, 809 (7th Cir. 1977).

The Respondent submitted arguments in regards to the Respondents perceived deadline of filing the Respondent Answer to Complaint. However, the Respondent has failed to produce any "good cause" as to why the Respondent could not file an answer before the date set under Fed. R. Civ. P. 12(a) . Furthermore, in regards to "Quick Action", nearly 17 days had passed after the entry of default before the Respondent filed a motion to set aside default. During the 17

day period after the entry of default, the Respondent had full access to legal counsel. "The Quick action to attack a default judgment is required because the cement of finality hardens each and every day beyond the entry of the judgment; the Petitioner increasingly fashions its expectations and affairs on having and holding the judgment as time passes". Counsel for the Respondent argued that he could not act quickly to the judgment because he was on vacation. The excuse of "being on vacation" should not be considered "good cause" to set aside default judgment.

The Respondent refused all attempts to allow the Petitioner to take any medication (***see Appendix –A34***). After numerous notifications of the Petitioner's medical needs (***see Appendix -A29, 30, 31, 32***), the Respondent acted with deliberate indifference to the Petitioner's constitutional rights while the Respondent was acting under the color of state law. The Respondent had complete control and responsibility of the entire pre-trial detainment procedure and must be held accountable for depriving an individual of his constitutional rights by a person acting under color of state law. **Walker v. Norris**, 917 F.2d 1449, 1452 (6th Cir. 1990).

The Respondent's move to set aside a default must address the legal sufficiency of the suit between the current parties and the sufficiency of the Petitioner's allegations to establish a claim for relief. See **Wahl v. McKiver**, 773 F.2d 1169 (11th Cir.1985). The Respondent's meritorious defense to the claim filed by the Petitioner was that "The Petitioner was a pre-trial detainee … not subject to protection … under the eighth amendment's ban against cruel and unusual punishment". With multiple request from the Petitioner and numerous requests from friends and family of the Petitioner concerning the serious need for the Petitioner's insulin (***see Appendix -A29, 30, 31, 32***), the Respondent showed deliberate indifference towards the Petitioner's serious need for medical care and medication which could have prevented

the onset of the diabetic seizures incurred by the Petitioner (*see Appendix –A36*).

In attacking the meritorious defense of the Respondents in regards to the eighth amendment not applying to pre-trial detainee, this court must consider the fact that the Fourth, Seventh and Eleventh Circuits have also concluded that the eighth amendment's ban against cruel and unusual punishment is applicable to a pretrial detainee. **Whisenaut v. Yuam,** 739 F.2d 160, 163 (4th Cir.1984); **Matzker v. Herr**, 748 F.2d 1142, 1146 (7th Cir.1984); **Hamm v. DeKalb County**, 774 F.2d 1567 (11th Cir.1985), cert. Denied, 475 U.S. 1096, 106 S.Ct.1492, 89 L.Ed.2d 894 (1986). The gross negligence of the Respondents and the Respondents deliberate indifference exists because the Respondents refused all requests from the Petitioner and friends and family member, that a strong likelihood of harm to the Petitioner would result if the Petitioner was not allowed to take the required insulin.

The Respondents failure to train or educate its employees to provide medical aid or medication does rise to the level and standard of deliberate indifference and gross negligence because of the numerous notifications the Respondents received during the course of the Petitioner's detainment and because the Respondent was notified that the Petitioner was a diabetic. "Deliberate indifference exists when action is not taken in the face of a strong likelihood ... of harm ..". **State Bank of St. Charles v. Camic**, 712 F.2d 1140, 1146 (7th Cir.1983). Furthermore, it cannot be said that the Petitioner can prove no set of facts in support of his claim under either standard which would entitle the Petitioner to relief. **Hishon v. King & Spalding**, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59(1984); **Madden v. City of Meriden**, 602 F.Supp. 1160, 1163-1164 (D.Conn.1985). The Respondent's police report clearly states that the Petitioner complained of pain and requested his medical insulin (*see Appendix –A34*).

The Respondents were the only emergency medical persons available to provide treatment or access to medical treatment. By the Respondents actions of refusing to contact outside medical persons, the Respondents assumed the roles and responsibility of the first medical person at the scene where medical treatment was requested by the Petitioner. The Respondents clear refusal to provide medical treatment after the Respondents were notified that harm would result violated the Michigan Emergency Medical Services Act (EMSA) M.C.L.A. 333.20965, for reckless conduct demonstrating substantial lack of concern for whether injuries would result and for the willful misconduct under EMSA, of the Respondents actual intent to harm the Petitioner by not allowing the Petitioner medical insulin or access to medical treatment and not providing medical treatment for the Petitioner's diabetic condition.

The right to personal security is not extinguished by lawful confinement, **Hutto v. Finney**, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). The interest in safe conditions clearly applies to the Petitioner's access to immediately required medicine in which the Respondents had complete control. The Respondents took no further action after notification of the Petitioner's medical needs, except as to provide a blanket to the Petitioner (***see Appendix –A34***). The Respondents showed a complete failure to train its personnel to identify medical emergencies or the Respondent's training is so reckless or grossly negligent that future negligent conduct is almost inevitable", **Rheuark v. Shaw**, 477 F.Supp. 897 (N.D.Texas 1979). Furthermore, the Respondents failed to train its personnel to recognize that abdominal pain was the first stage of diabetic seizures. Also, the Respondents failed to train its personnel to include medical discharge reports, which clearly stated that Petitioner must return to hospital if pain gets worst, to the next shift supervisor.

The Respondents must be held liable for the continual constitutional violation of rights of a pretrial detainee. The Respondents have established a unconstitutional policy of abusing the medical requirements and needs and civil rights of a pretrial detainee as shown in the case **Joseph Ziegler v. City of Farmington Hills Police Department**, cite as : 902 F.2d 36, 1990 WL 58397 (6th Cir.(Mich.) and in the case **Gayna Willing v. City of Farmington Hills** cite 159 MichApp. 366, 406 N.W.2d 298. The Respondents practices and customs of abusing the medical needs and civil rights of a pretrial detainee, has shown that repeated abuses will continue.

The forfeiture of qualified immunity of the Respondent was in full force because the complaint filed by the Petitioner specifically sought damages under some provision of the Constitution of the United States of America. (Id. At 196 and n. 14, 104 S.Ct. at 3020 and n. 14). The principles of police immunity under Michigan state tort law are not applicable to violations of the Constitution 42 U.S.C.A. 1983. The actions displayed by the Respondent's violation of the Petitioner's constitutional rights demonstrated total lack of concern for the needs of the Petitioner, known to be a diabetic (***see Appendix –A36***), and may not have met minimum standards in exercising professionally acceptable judgment. 42 U.S.C.A. 1983; U.S.C.A. Const.Amend. 14.

The Respondent defense to the complaint was that the Respondent was not a legal entity which may be sued under state law. The District Court abuse its discretion by siding with the Respondent's non-entity claim. The District Court did abuse its discretion in granting a motion to set aside default against the Respondent for the issues related to legal entity status. The Respondent did not file any motions related to the jurisdiction of the District Court. Also the Respondents' initial motions did not include any reference to the jurisdiction of the District Court.

Under Rule 9 (a) of the Federal Rules of Civil Procedure it states "It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court.". In this case, the Respondent has not objected to the issue of jurisdiction of the court.

The Respondent with experienced legal representation was aware of pending legal action. The Respondent also had full access to legal counsel which makes the Respondent's task of showing "good cause" or "excusable neglect" more difficult. See **C.K.S. Eng'g, Inc. v. White Mountain Gypsum Co.,** 726 F.2d 1202, 1208 (7th Cir. 1984). Furthermore, Rule 60(b) (1) and the standard for vacating default judgments requires that "cause" for failure to respond be separated from "good cause," and "neglect" of litigation from "excusable neglect." Extraordinary circumstances must exist as a sufficient condition to justify disturbing a default judgment, e.g., **C.K.S. Eng'g, Inc.,** 726 F.2d at 1204-05; **Planet Corp. v. Sullivan**, 702 F.2d 123, 125 (7th Cir. 1983), "or at least the absence of any willful disregard for duties, simple carelessness, or negligence before a default judgment will be vacated". C.K.S. Eng'g, Inc., 726 F.2d at 1206.

Also the theme running through the case law which exhibits a stern predilection for leaving intact default judgments "where it appears that the defaulting party has willfully chosen not to conduct its litigation with the degree of diligence and expediency prescribed by the court .. .. ..", C.K.S. Eng'g Inc., 726 F.2d at 1205. See also **Textile Banking Co. v. Rentschler**, 657 F.2d 844, 854 (7th Cir. 1981). The Farmington Hills Police Department must be held accountable as would a department of within the State of Michigan as ordered in MCL 691.1401, 691.1402, 691.1404. And the immunities claims of the Respondent are only enforced during written actions from the attorney general as

ordered in MCL 28.6. Cite as : *87 Mich.App. 361, 275 N.W.2d 2* ***Berger v City of Berkley*** *application of governmental immunity to municipalities and police department M.C.L.A. §§ 691.1401 et., 691.1407 operation and control of police department is municipal function, and tort actions directed against such department are defeated on grounds of governmental immunity. Police departments and departments of public safety stand on same footing as municipalities themselves for purposes of immunity as there is no immunity on basis of inability of departments to raise funds; immunity of departments must rest on same statute as immunity of municipalities. M.C.L.A. § 691.1401 et seq.* ***Thomas v. Department of State Highways****. 398 Mich. 1, 18, 247 N.W.2d 530 (1976). Inability to raise funds was nothing more than one of the stated justifications for the doctrine of governmental immunity , not a separate immunity.* ***Bush v. Oscoda Area Schools****. 72 Mich. App. 670, 685, 250 N.W.2d 759 (1976).* Michigan governmental immunity act M.C.L. s 691.1405; M.S.A. s 3.996(105), permits recovery because the Respondent is being accused of violation of Constitutional Laws of the United States of America.

The Respondent's actions are the result of a community policing policy, which unconstitutionally targets African Americans. African Americans within the Respondents' police force comprise less than five percent (5%) of the total sworn police officers. The Respondents' community comprises less than two percent (2%) African-Americans. However, during the detainment of the Petitioner, over sixty percent (60%) of the persons held in custody by the Respondents were African-Americans ***(see Appendix –A50).*** These facts alone should show that the Respondents have a *policy of operation* which produces a very high arrest rate among African Americans traveling through the City of Farmington Hills. This high arrest rate can not be considered random nor a standard. This high arrest rate can only be attributed to an ongoing policy which specifically targets

African Americans in violation of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. . Furthermore, examination of all the facts within this document shows that the Respondents' *policy of operation* must have a bias towards African-Americans.

The arresting officer in this case claimed that the Petitioner's license plate was invalid. However, the Petitioner's vehicle was legally registered with the State of Michigan ***(see Appendix –A22)***. The arresting officer claimed that the Petitioner license plate did not show up in the computer search. The arresting officer did not have probable cause to believe that the Petitioner had committed a traffic violation or that the Petitioner was about to commit a traffic violation. The arresting officer did not suspect that the Petitioner vehicle or license plate was stolen. Furthermore, At the moment that the arresting officer decided to stop the Petitioner, the circumstances and facts surrounding the stop of the Petitioner vehicle could only lead a reasonable person to conclude that either the license plate was new or that the Respondents misread the license plate. Neither of which can be consider grounds for violation of Forth Amendment protections.

The Respondent's unconstitutional policy of targeting African Americans is becoming apparent by the repeated unconstitutional pattern of detaining African American males under the authority of M.C.L.A. 257.321(a) and conspired to violate the constitutional right of interstate travel of African American males as shown in the complaint filed by Perrion Robbins with the Civil Rights Department (***see Appendix - A37***). The Respondents acting under the color of state law, repeatedly use a Michigan Law (M.C.L.A 257.321(a)) which allows the immediate suspension of a driver license without any due process or the ability to challenge any traffic fines. An operator's license may not be suspended or revoked without due process of law. **Nicholas v. Secretary of State** (1977) 253 N.W.2d 662, 74 Mich.App. 64. .

A provision of the section M.C.L.A. 257.321 states that after diligent search and inquiry concerning whereabouts of driver of automobile, service of notice cannot be made on driver concerning hearing for suspension or revocation of driver's license, license shall be revoked without further notice, does not become effective until a registered letter has been sent to the driver's last known address, ..." **(McMullen v. Alger** (1954) 63 N.W.2d 599, 339 Mich. 175) . The Petitioner received no such letter. The Petitioner did not received the required hearing or notice of a hearing. Also, the Michigan Secretary of State has not produce any notice of a hearing for the Petitioner. *"Provision of order of restoration requiring license revocation upon mere citation for a traffic offense is violative of due process."* **Nicholas v. Secretary of State** (1977) 253 N.W.2d 662, 74 Mich.App. 64.

The restoration of the Petitioner's driver's license was performed only after the Petitioner paid all costs associated with the suspension without any process to challenge any of the traffic related fines. Due process demands a preliminary screening by a decision maker more detached than a complaining witness in order to warrant a suspension or revocation of a driver's license. ." **Nicholas v. Secretary of State** (1977) 253 N.W.2d 662, 74 Mich.App. 64. . The Respondent defense to the detainment of the Petitioner was based on unconstitutional laws and as such the Respondent's defense should not be an excuse for the continued violation of the constitutional rights of the Petitioner.

After the initial detainment of the Petitioner, the Petitioner was transferred to the Botsford Hospital. After treatment for the diabetic pains the attending doctor gave specific instructions that the Petitioner should return to the hospital if the pain increased. The Petitioner was in the custody of the Respondent during the entire time at the hospital. The arresting officer was present when the doctor stated his instruction ***(see Appendix -A39).*** After being transferred back to the Respondent's holding cell, the Petitioner and his

family and friends pleaded with the Respondents to allow the Petitioner to take the required insulin. The Respondents refused all pleads and the Petitioner was not allowed to take the medically required insulin, or return to the hospital, which would have prevented the diabetic seizures (***see Appendix – A36***).

The unconstitutional detention and physical treatment of the Petitioner and the deliberate indifference towards the Petitioner, in refusing all warnings and instructions in regards to the Petitioner need for insulin, signifies that the Respondents was the primary cause of the cruel pain and suffering incurred by Petitioner during the diabetic seizures. Furthermore, the cruel pain and suffering could have been totally avoided if the Respondents had respected the pleas of the Petitioner and the hospital discharge report, which required the Petitioner to return to the emergency room if the pain increased ***(see Appendix -A39)***.

Section 42 U.S.C. § 1983 provides that "*every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjected, any citizen of the United States .. to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws*" shall be civilly liable to the injured party. 42 U.S.C. § 1983. The Petitioner has shown that the Respondent has deprived the Petitioner of a federal right, and that the Respondents were acting under color of state law. **Gomez v. Toledo,** 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). As such, dismissal of this case would be an abuse of discretion by the District Court.

The Respondent filed a motion to set aside the default based on Fed. R. Civ. P 55(c). This rule states that "*For good cause shown the court may set aside an entry of default.*" The District Court failed to identify the "*good cause*" of the default. Assuming true, the Respondents' claim of the Farmington Hills Police Department not being a legal entity which may be subject to suit, no evidence is on record

showing that the legal entity status of the Farmington Hills Police Department caused the default to be entered. Furthermore, the Respondents did not file any motions to challenge the entry of default before the ten (10) day time limit for motions and appeals. Nor, did the Respondents file any motions to dismiss the Farmington Hills Police Department as a party to this suit. Also, the use of Fed. R. Civ. P. 60(b)(6) to set aside the default for "*any other reason*" was invalid because there was no good cause for the default shown.

In review of the transcript, the District Court has specifically said it will not authorize a judgment against the Farmington Hills Police Department in any form. The action of not allowing any judgment to stand because of the Respondents claim of non-legal entity status is in effect a dismissal of the Farmington Hills Police Department as a party of the suit. The District Court has abused its discretion in dismissing any civil action towards the Farmington Hills Police Department, which is in violation of 42 U.S.C. § 1983 which provides that "*every person who, under color of any statute, ... , shall be civilly liable to the injured party.*" The Petitioner has stated he was denied a federal right and that the Respondent was acting under the color of state law. **Gomez v. Toledo**, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). The District Court has said that the "*default is not worth the paper it is written on.*".

If the District Court has in effect dismissed the Farmington Hills Police Department as a party to this case for reasons that the Petitioner can not claim relief, then the District Court's actions must conform to Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), "*the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,..*" . Under Fed. R. Civ. P. 56(c), motions must be served at least ten (10) days before the time fixed for the hearing. Review of the record will show that the Respondents did not file the motion until January 5, 1998. The hearing was

held on January 14, 1998. The Respondents failed to serve the motion at least ten (10) days before the hearing as required by Fed. R. Civ. P. 56(c).

The Petitioner has the right for this Supreme Court to redress the deprivation, under color of Michigan Law, M.C.L.A. 257.321(a), of the right of Due Process secured by the Constitution of the United States and by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; as outlined in Title 28 section 1343(a)(3). Furthermore, the Petitioner has the right to recover damages from the Respondents' failure to prevent or to aid in preventing the cruel punishment of diabetic seizures and the right to medical services to prevent seizures, in which the Respondents had knowledge that cruel punishment was to occur and power to prevent, as authorized under Title 28 section 1343(a)(2). The Respondents used M.C.L.A. 257.321(a) to conspire to violate the constitutional right of interstate travel of the Petitioner and other African-Americans in violation of Title 42 section 1985.

The Respondents violated the fourteenth amendment of the Constitutional of the United States by enforcing M.C.L.A. 257.321(a). The Respondents have established a custom and pattern of utilizing M.C.L.A. 257.321(a), to conspire against African-Americans right of interstate travel within the City of Farmington Hills, Michigan, Oakland County. The State of Michigan, under application from the Respondents, has committed for trial in Oakland County Michigan Circuit Court , the Petitioner, under the authority of M.C.L.A. 257.321(a). The action of the State of Michigan, initiated by the Respondents, establish a clear violation of Constitutional Laws. The Respondents used M.C.L.A. 257.321(a) as the primary grounds for the arrest and detainment of the Petitioner.

Michigan Law does allow actions to be brought against a governmental unit identified in its own name of Farmington

Hills Police Department under M.C.L.A 600.2051(4). The matter of dismissing a party without regards to 42 U.S.C. § 1983 or 1985 must be considered prejudicial against the Petitioner and thus fails to meet the requirements for setting aside a default under Fed. R. Civ. P. 55(c) or 60(b). Also, the Respondents have failed to supply a meritorious defense to why the Petitioner was not allowed to take the required insulin. Furthermore, if the District Court Order setting aside default is not reversed, the Petitioner has no other method of challenging the Farmington Hills Police Department directly for the unconstitutional acts performed by the Farmington Hills Police Department.

The Respondents acting under color of Michigan Law M.C.L.A. 257.321(a), which violates due process, failed to prevent or aid in preventing wrongs, mentioned in section 1985 of Title 42, in which the Respondents had knowledge that wrongs were about to occur and the power to prevent the wrongs from occurring. Furthermore, the Respondents have repeatedly used the color of Michigan Law to conspire against African-Americans right of interstate travel. The Respondents have an established custom of deprivation of multiple protected rights and interest due to inadequate procedures and training of the Respondents personnel. The Respondents violation of section 1983 and 1985 of Title 42 provided no evidence that a predeprivation hearing was impracticable nor is there a state law which applies an adequate postdeprivation remedy in regards to M.C.L.A. 257.321(a), accept as to pay all fines reported without any means to object to M.C.L.A 257.321(a) violations, before a citizen is subjected to arrest.

CONCLUSION

The Petitioner has exhausted all other remedies which may have corrected the error in which the Petitioner was denied equal justice of an appeal. The District Courts reliance on the

cite of the Michigan Court of Appeals stated in *McPherson v. Fitzpatrick*, 63 Mich.App. 461, 464 (1975), "*A municipal department, board, or commission, such as the Detroit Police Department, is unable to raise funds for payment and is not liable in tort*", can not apply to the Farmington Hills Police Department because the department has raised funds in the past (see Appendix-A112).

The Petitioner was wrongfully detained by the Respondents for driving on a suspended driver's license under MCLA 257.321a. The Constitution requires the police to have the element of probable cause, in order to make a lawful arrest. The Petitioner denied the validity of the information of the suspension by producing a valid Ohio Driver license. The opinion of the Michigan Attorney General has stated that a suspension under MCLA 257.321a is unconstitutional.

The impoundment and inventory search of the Petitioner's vehicle was in violation of MCLA 257.252d and must also be considered unconstitutional. There was no probable cause to believe that some illegal items were in the Petitioner's vehicle. This court has said that being jailed without an opportunity for probable cause determination is unconstitutional.

A reasonable person who has a valid Ohio Driver license would assume that an Ohio driver's license is valid in all states in the union. The Petitioner had a right to a probable cause determination before the Petitioner was arrested and subjected to medical torture from the Respondents.

Charges set forth by the Petitioner in other documents must be considered part of the Petitioner's complaint. In all fairness, this court must review this petition liberally and less stringent than formal pleadings drafted by lawyers. The Petitioners prays that this great Supreme Court exercise its discretion to reverse the order of the District Court and to allow this case to proceed to trial by jury.

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Case No. 98-1148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DUANE MONTGOMERY, Plaintiff-Appellant,	)	FILED
	)	APR 22 1998
	)	LEONARD GREEN, Clerk
v.	)	
	)	ORDER
	)	
CITY OF FARMINGTON HILLS; FARMINGTON HILLS POLICE DEPARTMENT, Defendants-Appellees	)	
	)	
	)	

Before: GUY, GILMAN, and GODBOLD, * Circuit Judges.

This matter is before the court upon initial consideration of appellate jurisdiction.

A review of the documents before the courts indicates that on December 29, 1997 the appellant requested a default judgment against the Farmington Hills Police Department. A motion to set aside the default judgment was granted by order filed January 26, 1998. Appellant appealed from the order granting the motion to set aside the default judgment.

This court lacks jurisdiction in this appeal. An order granting a motion to set aside a default judgment is not appealable. Joseph v. Office of the Consulate Gen. Of Nig., 830 F.2d 1018, 1028 (9th Cir. 1987), cert. Denied, 485 U.S. 905 (1988). Although the district court's January 26, 1998 order allegedly set aside a default judgment, no default judgment is noted on the district court docket sheet. Even if the January 26, 1998 order is treated as an order denying a default judgment, such an order is not appealable. Bird v. Reese, 875 F.2d 256, 256(9th Cir. 1989) (order); McNutt v. Cardox Corp., 329 F.2d 107, 108 (6th Cir. 1964) (per curiam).

It is ordered that the appeal is dismissed for lack of jurisdiction

ENTERED BY ORDER OF THE COURT

Signed: Leonard Green
Clerk

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*The Honorable John C. Godbold, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUANE MONTGOMERY, CASE NO.:97-CV-75838-DT

Plaintiff, HON. PATRICK J. DUGGAN

vs.

CITY OF FARMINGTON HILLS and FARMINGTON HILLS POLICE DEPARTMENT.

Defendants.

_____/

ORDER GRANTING DEFENDANT FARMINGTON HILLS POLICE DEPARTMENT'S MOTION TO SET ASIDE DEFAULT

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on January 26, 1998.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

This matter is before the Court on defendant Farmington Hills Police Department's motion to set aside default.

Plaintiff asserts that he mailed a copy of the summons and complaint to the Farmington Hills Police Department and that "the summons was signed for on November 26, 1997." (PL.'s Reply, para 2). A Clerk's Entry of Default was entered against the defendant on December 18, 1997.

On January 5, 1998, defendant Farmington Hills Police Department filed a motion to set aside default asserting as a basis

for setting aside the default, among other reasons, the fact that the police department is not an entity that can be sued and therefore neither a "default" nor a "default judgment" can be entered against it. This Court agrees.

As the Michigan Court of Appeals stated in *McPherson v. Fitzpatrick*, 63 Mich.App. 461, 464 (1975), "A municipal department, board, or commission, such as the Detroit Police Department, is unable to raise funds for payment and is not liable in tort. Therefore, the police department is not liable in a tort action directed solely against said department." (Citation omitted); see also Davis v. Chrysler Corp., 151 Mich.App. 463, 466 n.1 (1986) ("Although plaintiffs' complaint named the Detroit Public Lighting Department as a defendant, the department is not a separate legal entity against which a tort action can be directed.") (citing *McPherson v. Fitzpatrick*).

Since the Farmington Hills Police Department is not an entity which can be sued in a tort action, defendant's motion to set aside default against it must be granted. Therefore,

IT IS ORDERED that defendant Farmington Hills Police Department's motion to set aside default is GRANTED and the default is SET ASIDE.

PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE
Copies to:

Duane Montgomery
c/o ETR, Inc.
Ste. 200
33523 Eight Mile Rd., Ste. 108
Bldg A-3
Livonia, MI 48152

Michael E. Rosati, Esq.
34405 W. Twelve Mile Rd.,
Farmington Hills, MI 48331

Case No: 98-1148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

DUANE MONTGOMERY
Plaintiff-Appellant

v.

CITY OF FARMINGTON HILLS; FARMINGTON HILLS POLICE DEPARTMENT
Defendants-Appellees

BEFORE: GUY, GILMAN, and GODBOLD*, Circuit Judges.

The appellant has submitted an untimely petition for rehearing. Upon consideration, the petition for rehearing shall be accepted for filing.

Upon further consideration, it is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
LEONARD GREEN, CLERK

---

*The Honorable John C. Godbold, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

(Cite as: 958 F.2d 372, 1992 WL 51474 (6th Cir.(Ky.)))

NOTICE: Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Dormas RUSSELL, Plaintiff-Appellant,

v.

Newton LUCKETT and John Roution, Defendants-Appellees.

No. 91-5575.

United States Court of Appeals, Sixth Circuit.

March 18, 1992.

On Appeal from the United States District Court for the Western District of Kentucky, 88-00806, Ballantine, J.

W.D.Ky.

REVERSED AND REMANDED.

Before NATHANIEL R. JONES and MILBURN, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM.

****1** Plaintiff Dormas Russell appeals the orders setting aside the entry of default for plaintiff and directing a verdict for defendants Newton Luckett, a jailer, and John Roution, a deputy, in this civil rights action alleging reckless disregard for safety amounting to

cruel and unusual punishment. For the reasons that follow, we reverse.

I

At the time of the events relevant to this action, Russell was serving a sentence at Marion County Jail for robbery and attempted escape. The incident leading to the present action began when Todd Beck purchased a candy bar and soft drink for both himself and Russell. Chris Gunn then approached Beck and attempted to take his candy bar and drink away from him. Russell stepped in between Gunn and Beck, and a verbal confrontation ensued. Russell then returned to his bunk to play cards with Beck, when Gunn suddenly struck him with a broom handle, knocking out the four middle teeth of his upper partial bridge. [FN1] Russell also suffered a black eye and lacerated lip.

> FN1. Russell had a permanent eight-tooth bridge attached to his natural teeth as a result of an injury received in an automobile accident.

After removing Russell and Beck to another cell, jail personnel took Russell to see a Dr. Polk on two occasions and Dr. Clay Stuart, Russell's longtime dentist, on yet another occasion. [FN2] Although Russell testified that he did not receive any type of treatment or repair of his teeth for approximately twenty-four months, he acknowledged on cross-examination that for twenty-two of those twenty-four months he was not at the Marion County Jail. He spent the latter period at the Kentucky State Reformatory, where his teeth were not repaired because his condition was characterized as cosmetic.

> FN2. Dr. Stuart had treated Russell since 1979, prior to the automobile accident that first damaged his teeth.

After Russell's release from the penitentiary, Dr. Stuart temporarily repaired the bridge at a cost of $850.00. Dr. Stuart estimated that complete replacement would cost $2,400.00.

On November 18, 1988, Russell filed a complaint seeking recovery against Luckett and Roution, among others, under 42 U.S.C. § 1983 (1988) for injuries he sustained while in their custody in the Marion County Jail. Each defendant was served with a copy of the complaint on November 29, 1988. In the complaint, Russell alleged that Luckett and Roution housed him in a cell with individuals that they knew were prone to violence. He alleges further that Luckett and Roution were responsible for a broom being left in his cell and, therefore, being used by a fellow inmate to assault him.

Marion County Attorney Charles T. Mattingly was the attorney for Luckett and Roution. Although Mattingly frequently discussed the case with counsel for Russell, James H. Abell, and Abell urged him to file an answer on behalf of Luckett and Roution, Mattingly failed to do so.

Counsel for Russell sought a default judgment against Luckett and Roution on September 18, 1989. On December 13, 1989, the district court made an entry of default against them on the issue of liability and scheduled the matter for hearing on damages for January 31, 1990. On January 17, 1990, however, Kenneth Nevitt, attorney for Marion County's insurer, appeared on behalf of Luckett and Roution and moved the district court to set aside its entry of default of December 13, 1989. Nevitt's motion explained that Mattingly's failure to file an answer or appear for over one year was "due to excusable neglect." J.A. at 28. In particular, Luckett and Roution alleged that,

**2 in March, 1989, they received notice that a motion to dismiss had been granted to the Defendants. This Order by the Court did not state which parties had been dismissed and Defendants Luckett and Roution assumed that the action had been dismissed against them. They also assumed that the county attorney had filed an answer on their behalf.

Id. Therefore, Nevitt asked the court to "allow these parties an additional twenty (20) days from the date of this Order to file an answer to this complaint." Id.

After considering arguments by counsel for both sides, the district court directed Luckett and Roution to submit "an affidavit from the Marion County Attorney relative to his conversations and dealings with counsel for plaintiff." Id. at 46. After three months passed without a response to its request, the court denied the motion to vacate the entry of default and again scheduled a hearing on August 3, 1990 for the assessment of damages. Prior to that hearing, Nevitt moved the court to substitute Charles Mattingly as counsel of record, which the court ordered on June 29, 1990.

The court rescheduled the hearing for September 28, 1990. On September 21, 1990, however, Joseph H. Mattingly III filed a motion on behalf of Luckett and Roution to continue the hearing on damages, explaining that Charles Mattingly had died on September 4, 1990. Subsequently, on October 15, 1990, Joseph H. Mattingly III filed a motion on behalf of Luckett and Roution, asking the court to reconsider its order denying Luckett's and Roution's motion to vacate entry of default. He included with the motion an answer to the original complaint. Over Russell's objections, the court vacated the entry of default and allowed Luckett and Roution to file the answer on November 9, 1990, just nine days short of two years after Luckett and Roution were served with summons and complaint in this action. The court scheduled the matter for jury trial on February 1, 1991.

Because Russell's injury occurred while he was in custody, the key witnesses in his case were also in custody at the Marion County Jail. By the time this case finally proceeded to trial, several of the witnesses were incarcerated in institutions elsewhere in Kentucky, and others were nowhere to be found. Russell's counsel did, however, locate two witnesses.

Nevitt reappeared as counsel for Luckett and Roution on January 14, 1991. Two weeks later, the matter was tried before a jury. Dr. Stuart testified that, as a result of the assault and loss of his upper four front teeth, Russell suffered immediate pain and injury, and until his bridge was repaired over two years later, he had trouble biting, and his speech was affected by a lisp. His appearance was

also an embarrassment to him.

At the conclusion of Russell's case, the judge directed a verdict in favor of Luckett and Roution and dismissed the case with prejudice. Russell now brings this appeal.

II

Russell contends that the district court abused its discretion in setting aside the default judgment almost a year after its entry and two years after Luckett and Roution were served with a summons and complaint. The district court may set aside an entry of default "for good cause shown." Fed.R.Civ.P. 55(c). The district court's decision is reviewed for abuse of discretion. United Coin Meter Co. v. Seaboard Coastline R.R., 705 F.2d 839, 843 (6th Cir.1983). In making this determination, the court of appeals employs a three-part test: " '[1] [w]hether the plaintiff will be prejudiced; [2] [w]hether the defendant has a meritorious defense; and [3] [w]hether culpable conduct of the defendant led to the default.' " INVST Finan. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 398 (6th Cir.) (quoting United Coin, 705 F.2d at 845), cert. denied, 484 U.S. 927 (1987). "The same considerations exist when deciding whether to set aside either an entry of default [Rule 55(c)] or a default judgment [Rule 60(b)], but they are to be applied more liberally when reviewing an entry of default." Berthelsen v. Kane, 907 F.2d 617, 620 (6th Cir.1990) (per curiam). " 'Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits.' " United Coin, 705 F.2d at 846 (quoting Tozer v. Krause Milling Co., 189 F.2d 242, 245 (3d Cir.1951)).

**3 The first prong of the test asks whether the plaintiff would be prejudiced by the order setting aside default. Mere delay does not establish prejudice. INVST, 815 F.2d at 398. The plaintiff must show a negative effect from the delay, such as loss of evidence or difficulties in discovery. Id.

In his motion for reconsideration of the court's order setting aside default, Russell alleged such negative effects:

[D]uring the past two years the plaintiff's witnesses who were present at the time of the injury have moved to other jurisdictions unknown to the plaintiff. At this late date, it will be difficult, if not impossible, to locate those witnesses and bring them to trial to testify on behalf of the plaintiff.

Even if the plaintiff is able to locate the missing witnesses, the events which are the subject of this action occurred years ago. At this point, the evidence from both a documentary and testimonial standpoint is stale.

J.A. at 119. Russell's injury occurred while he was in custody at Marion County Jail, so the key witnesses were also in custody at that time. Two years later, however, the witnesses were all either in other prisons or nowhere to be found. Under the circumstances of this case, it seems that Russell made an adequate showing of prejudice.

The second prong of the test asks whether the defendant has a meritorious defense. This is not meant to be a technical inquiry. "The key consideration is 'to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.' " INVST, 815 F.2d at 399 (quoting 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2697, at 531 (1983)). In this regard, Luckett and Roution asserted the following in their successful motion to set aside default:

Basically, the Plaintiff alleges that the Defendants' conduct constituted a reckless disregard for his health and safety. However, the allegations contained in the Plaintiff's complaint, at best, raise issues of negligence which is not cognizable as a constitutional violation. Swarts v. Johnson, 628 F.Supp. 549 (W.D.Mich.1986). The indifference alleged of the Defendants must be substantial to violate the constitution. Estelle v. Gamble, 429 U.S. 97 ... (1976).

The Defendants specifically deny the bulk of the allegations

contained in the Plaintiff's complaint concerning the "known history of assaulting other inmates" of the other prisoners with whom the Plaintiff was placed. The Defendants would further seek to show that promptly following the incident they took the Plaintiff to a local dentist who examined the Plaintiff's condition and determined that there was no medical urgency to perform the dental work requested by the Plaintiff.

The Plaintiff was in the custody of the Marion County Jailer and his Deputy for slightly over one month. Following that period of incarceration, he was transferred to the custody of the Warden of the Kentucky State Reformatory. Claims were made against the Warden of that reformatory and against the Secretary of the Corrections Cabinet of the Commonwealth of Kentucky on similar grounds. Those causes of action were dismissed by this Court and it is the Defendants' belief that if they are provided an opportunity to defend this action the Court will find that the claims against them are equally without merit.

**4 J.A. at 65-66. The fact that Luckett and Roution were not aware of the dangerous propensities of Gunn and the other individuals in the cell at the time of the incident is certainly a defense if proven. [FN3] Thus, Luckett and Roution satisfied the second prong of the test.

> FN3. Note that Luckett's and Roution's other "defenses" address the provision of inadequate medical care, which Russell does not allege.

The third prong of the test asks whether culpable conduct of the defendant led to the default. "To be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." Shepard Claims Serv., Inc. v. William Darrah & Assocs., 796 F.2d 190, 194 (6th Cir.1986).

Shepard involved a case in which a lawyer was one week late in filing an answer due to his failure to review the work of his secretary. In finding no culpable conduct, the Shepard court relied

on the fact that "[t]he delay was not lengthy and there was no pattern of disregard for court orders or rules." Id. The court concluded as follows:

> Although a party who chooses an attorney takes the risk of suffering from the attorney's incompetence, we do not believe that this record exhibits circumstances in which a client should suffer the ultimate sanction of losing his case without any consideration of the merits because of his attorney's neglect and inattention.

Id. at 195.

In the case sub judice, however, the record clearly reveals a reckless pattern of disregard for the court's orders and rules. We may assume, arguendo, that the delay through January 17, 1990--resulting from Charles Mattingly's illness and Luckett's and Roution's confusion as to the status of the action--would not bar Luckett's and Roution's motion to set aside the default. Nonetheless, the failure of attorney Nevitt to respond to the court's request for additional information prevented resolution of this matter at an earlier date. Nevitt was much more than a last-minute substitute attorney; he played a central role in this litigation, as evidenced by his later return to try this case before a jury. Furthermore, Nevitt's return of the case to Charles Mattingly belies any contention that Luckett and Roution should not be accountable; certainly, once an attorney has failed to perform his or her duties on a client's behalf to the extent that substitute counsel is necessary, a client must assume the risk of returning the case to that same attorney.

The INVST court found no culpable conduct underlying a sixteen-month delay in filing an answer. 815 F.2d at 399-400. In that case, however, "both parties acted as if the answer had been filed or was not needed." Id. at 399. Here, Russell's counsel continuously demanded that Luckett's and Roution's counsel file an answer. Thus, review of the record reveals that default resulted from reckless disregard.

Balancing the factors is simpler than it might first appear. Only

one of the three factors weighs in favor of Luckett and Roution. To hold that Luckett and Roution are entitled to set aside the default would be to hold that a meritorious defense will always excuse a defendant's reckless disregard for the court and its rules and permit prejudice to the plaintiff. Such a holding would also reduce this court's inquiry to a one-prong test. Accordingly, review of the record in this case reveals that the district court abused its discretion in setting aside the default. [FN4]

> FN4. Because of our disposition of this issue, we do not reach the issue of whether the district court erred in directing a verdict for Luckett and Roution.

III

**5 For the foregoing reasons, the decision of the district court to set aside entry of default is REVERSED, the judgment of the district court is REVERSED, and the case is REMANDED for entry of default, a hearing on damages, and judgment by default.

ENGEL, Senior Circuit Judge, dissenting.

I respectfully dissent because I believe that the range of discretion accorded the trial judge in setting aside defaults under F.R.Civ.P. 55(c) (as contrasted to default judgments) is particularly broad.

Several factors support Judge Ballantine's action in setting aside the default. First, we have previously announced "a strong preference for trials on the merits." See, e.g., Shepard Claims Service v. William Darrah & Assoc., 796 F.2d 190, 193 (6th Cir.1986). In addition, it seems that this case presented genuine confusion regarding who was to represent the defendants. Such uncertainty is not unlikely where, as here, it is unclear whether the defendants are sued in a personal or official capacity. Further, one of the defense attorneys was terminally ill and ultimately died. Perhaps the illness should not excuse delay caused by other defense attorneys, but such questions seem peculiarly within the knowledge and judgment of a trial judge who is on the scene, who can better weigh the equities and hence exercise the discretion that Rule 55 confers. Finally, the "negative effects" of delay that

Russell alleged here are factually quite general and probably lacked the specificity which might otherwise have persuaded Judge Ballantine that Russell would be prejudiced by setting aside the default.

Had I been in Judge Ballantine's shoes, I might myself have denied the motion to set aside the default, because I am in general sympathy with many of the reasons set forth by the majority. There are good reasons to enforce the time requirements. Nevertheless Rule 55(c) vests a trial judge with broad discretion whether to set aside a default. A reasonable trial judge could have decided to set aside the default here. I would therefore affirm.

(Cite as: 872 F.2d 418, 1989 WL 27493 (4th Cir.(N.C.)))

NOTICE: Fourth Circuit Local Rule 36(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

R.D. PADGETT, Plaintiff-Appellant,

v.

SYNTHES, LTD., Defendant-Appellee.

No. 88-3927.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 13, 1989.

Decided March 17, 1989.

W.D.N.C., 677 F.Supp. 1329.

AFFIRMED.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Robert D. Potter, Chief Judge. (CA-86-294-A-C).

Bob Warren (Darrell Thomas Johnson, Jr., on brief) for appellant.

Elizabeth M. Warren (Isaac N. Northup, Jr., Steven D. Cogburn, Roberts, Stevens & Cogburn, P.A., on brief) for appellee.

Before SPROUSE, Circuit Judge, BUTZNER, Senior Circuit

Judge, and RICHARD B. KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

**1 R.D. Padgett appeals from the district court's orders setting aside an entry of default against the defendant, Synthes, Ltd., and granting a directed verdict in favor of Synthes. We affirm.

I

Padgett suffered a broken leg in an automobile accident. The orthopaedic surgeon who treated him attempted to stabilize the broken bone by implanting a metal compression plate manufactured by Synthes. Some time thereafter, Padgett's ostensibly healing leg collapsed under his weight, and the plate broke. Padgett then filed suit against Synthes in the district court, attempting to invoke the court's diversity jurisdiction under 28 U.S.C. § 1332. Padgett alleged that he was a citizen of North Carolina and Synthes either was a foreign corporation transacting business in North Carolina or an unincorporated association or partnership which transacts business in North Carolina.

Synthes did not respond to the complaint within the period required by Federal Rule of Civil Procedure 12(a). On Padgett's motion, the clerk entered a default against Synthes. The district court, however, set the default aside pursuant to Rule 55(c) on the ground that Padgett's complaint did not properly allege any basis for jurisdiction, and the clerk was without power to enter a default. The court then afforded Padgett an opportunity to amend his complaint, and Synthes filed a timely answer.

Padgett's allegation of diversity could not satisfy his burden of establishing the district court's jurisdiction. "In a properly pleaded diversity action between corporations the plaintiff will not only allege that there is diversity of citizenship, but will also advert to the factors set out by § 1332(c) that establish corporate citizenship." District of Columbia ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co., 797 F.2d 1041, 1043-44 (D.C.Cir.1986).

Relief from default lies within the discretion of the district court. United States v. Moradi, 673 F.2d 725, 727 (4th Cir.1982). Rule 55(c), under which such relief is sought, "must be 'liberally construed in order to provide relief from the onerous consequences of defaults and default judgments.' " Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 954 (4th Cir.1987). The district court did not abuse its discretion in setting aside Synthes' default and granting Padgett leave to amend.

II

Padgett also assigns error to the entry of a directed verdict for Synthes. He alleged that he was injured due to Synthes' negligence in designing and manufacturing the compression plate and by Synthes' failure adequately to warn of possible dangers associated with the plate. Padgett's expert witness, James F. Hills, was a mechanical and metallurgical engineer who had no expertise in biomedical engineering. Hills had never examined a compression plate other than the broken plate taken from Padgett's leg. He knew nothing about the plate's design, failure rate, or function. Hills testified that the compression plate might have been made more durable if it were thicker and wider and made of a stronger metal. But he also stated that he did not know whether the thicker, wider plate he proposed would be medically feasible, and he had not consulted any physician in order to determine medical feasibility. Padgett's treating physician was unable to say whether Padgett's healing process would have been better or worse if the plate had not fractured. He explained that a fracture could "go on to a delayed or nonunion despite the fact that the plate may be fully intact." He was unable to testify whether there was any causal connection between the breaking of the plate and movement of the fracture.

**2 Under North Carolina law, Padgett was required to show that the compression plate was negligently designed or manufactured, and that his injury resulted from a defect caused by that negligence. See City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 268 S.E.2d 190, 194 (1980). Viewing the evidence in the light most favorable to Padgett, he was unable to show either of

those essential elements.

Mr. Hills's testimony was largely irrelevant to the question of design or manufacturing defect, and Padgett presented no other evidence concerning the design and construction of the plate. The district court aptly observed that Mr. Hills knew a great deal about the stress of metal in airplane wings, but he knew next to nothing about the subject of this law suit, the design, and use of the plate applied to plaintiff's tibia. Moreover, the absence of any evidence indicating any defect or danger in the plate forecloses Padgett's claim that Synthes negligently failed to warn him of such a defect. Padgett's evidence also failed to show a causal connection between the breaking of the plate and the nonunion of his fracture.

In a carefully reasoned opinion, the district court fully reviewed under the proper standard the evidence and the inferences that could reasonably be drawn from the evidence. In agreement with the court, we conclude that Synthes was entitled to a directed verdict.

AFFIRMED.

MICHIGAN REGISTRATION CANDICE S. MILLER

Secretary of State

3889EJ 0359505

EXPIRES ON:	MONTHS	
042998	12	REPL WE2036

Make	Body Style	Code	County
LINCOLN	4 DOOR	03	82

Vehicle Number	Fee Cat. or Wt.	License Fee
1LNLM9841KY801095	30353	5.00

Owner's Driver License Number	County of Residence
M532155001328B	Wayne

Owner's Complete Name and Address

DUANE MONTGOMERY JR
1502 HARDING ST
DETROIT MI 48214

061297 Q6H163144 0046 5.00

IF YOU MOVE, YOU MUST CHANGE YOUR ADDRESS AT A SECRETARY OF STATE BRANCH OFFICE

George V. Volnovich, Governor Nancy P. Hollister, Lt. Governor

Franklin R. Caltrider
Registrar, Bureau of Motor Vehicles
4300 Kimberly Parkway
P.O. Box 16520
Columbus, OH 43266-0020
(814) 752-7500

OHIO DEPARTMENT OF PUBLIC SAFETY
* Administration
* Ohio State Highway Patrol
* Bureau of Motor Vehicles
* Division of Emergency
* Emergency Management

	DATE
47 BMV PHONE-INS	03/02/98

ETR/DUANE MONTGOMERY JR
33523 8-MILE RD A-3 108
LIVONIA MI 48152

	LAST NAME	DATE OF BIRTH	SOC SEC	OPERLIC
REQ	MONTGOMERY*DUANE%JR	04/29/67	386406334	RS615688

In response to your driver license verification request, the drivers license records on file at the Ohio Bureau of Motor Vehicles disclose the following:

NAME	SOCIAL SECURITY
MONTGOMERY*DUANE%JR	386406334

ADDRESS
1064 N MAIN ST BOWLING GREEN OH 43622

DRIVER LICENSE	DATE ISSUED	DATE EXPIRES
RS615688	08/16/97	04/29/01

LICENSE STATUS

LIC STATUS AS OF 030298 VALID

LICENSE CLASS

D-OPERATOR

SIGNED FRANKLIN R. CALTRIDER, REGISTAR

CITY OF FARMINGTON HILLS POLICE DEPT.
31655 W. Eleven Mile Road- Farmington Hills, MI 48338
Phone 474-8181 ORI # MI6338900

NARRATIVE REPORT PAGE 2 OF 2

DATE	DAY	SHIFT	PLATOON	BADGE#	YR	INCIDENT NO.
042296	MON	02	07	057	96	9797

The Michigan State Police have advised that Montgomery has never been employed by this agency. Detroit Edison refused to provide any employee information without a subpoena. Attempts to contact the registered owner of the vehicle have been unsuccessful

Writer has advised Prosecutor Pope of the above and was advised that a CCW warrant would be denied due to the valid CCW permit. Writer will present the above case to the City Attorney and request a warrant for Interfering with a Police Officer. The Wayne County Gun Board has requested that a copy of this report be provided for review of this incident.

STATUS: OPEN

SIGNED
INVESTIGATION OFFICER
TIGERMAN

CITY OF FARMINGTON HILLS POLICE DEPT.
31655 W. Eleven Mile Road- Farmington Hills, MI 48338
Phone 474-8181 ORI # MI6338900

NARRATIVE REPORT PAGE 1 OF 2

DATE	DAY	SHIFT	PLATOON	BADGE#	YR	INCIDENT NO.
112097	THD	03	03	052	97	32240

OFFICER NEWCOMB AND OFFICER NICHOLAS WERE SOUTH BOUND ON ORCHARD LAKE RD. STOPPED AT 13 MILE RD. OFC. NEWCOMB WAS BEHIND THE SUSPECT AND NICHOLAS WAS TO THE RIGHT OF THE VEHICLE. OFC NEWCOMB NOTICED THE SUSPECTS LICENSE PLATE IMPROPERLY DISPLAYED IN THE REAR WINDOW. THE VIEW OF THE PLATE WAS ALSO BLOCKED BY THE 3RD TAILLIGHT. NICHOLAS RAN WHAT HE BELIEVED TO BE THE PLATE (3889 FJ) WHICH RETURNED NO RECORD. OFFICERS STOPPED THE SUSPECT ON ORCHARD SOUTH OF 13 MILE AND APPROACHED THE SUSPECT. SUSPECT (DUANE MONTGOMERY JR B/M 04-29-67) DEMANDED TO KNOW WHY HE WAS STOPPED. OFC NEWCOMB ADVISED MONTGOMERY HIS PLATE WAS IMPROPERLY DISPLAYED. MONTGOMERY PRODUCE HIS OHIO DRIVERS LICENSE AND VEHICLE REGISTRATION. OFC NEWCOMB RAN MONTGOMERY THROUGH LEIN/SOS AND MONTGOMERY RETURNED WITH 5 SUSPENSIONS WITH NO PRIORS. MONTGOMERY ADVISED OFFICERS THAT HE LIVES IN OHIO AND THOUGHT HE COULD DRIVE IN MICHIGAN IF HE OHIO OPERATOR LICENSE WAS VALID. MONTGOMERY WAS ASKED TO EXIT TO THE VEHICLE AND WAS ADVISED HE WAS UNDER ARREST FOR D.W.L.S. MONTGOMERY WAS SEARCHED INCIDENT TO ARREST AND WHEN ASKED IF HE HAD ANY WEAPONS ON HIM HE STATED "NO, NOT ON ME" MONTGOMERY WAS PLACED IN THE PATROL AND OFC NICHOLAS CONDUCTED A SEARCH OF THE SUSPECT'S VEHICLE. OFC NICHOLAS DISCOVERED A SEMI-AUTO

HAND GUN LOCATED UNDER THE DRIVERS SEAT. MONTGOMERY ADVISED HE HAS A C.C.W. PERMIT BUT DID NOT HAVE THE PERMIT WITH HIM. MONTOGMERY ADVISED HE WAS ARRESTED LAST YEAR FOR C.C.W.

SIGNED
INVESTIGATION OFFICER
NEWCOMB

CITY OF FARMINGTON HILLS POLICE DEPT.
31655 W. Eleven Mile Road- Farmington Hills, MI 48338
Phone 474-8181 ORI # MI6338900

NARRATIVE REPORT PAGE 2 OF 2

DATE	DAY	SHIFT	PLATOON	BADGE#	YR	INCIDENT NO.
112097	THD	03	03	052	97	32240

UPON LEAVING THE SCENE AND EN ROUTE TO THE STATION. MONTGOMERY ADVISED HE IS DIABETIC AND DID NOT TAKE HIS AFTERNOON INSULIN. UPON ARRIVAL AT THE STATION, PARAMEDIC WERE SENT TO THE STATION AND MONTGOMERY WAS TRANSFERRED TO BOTSFORD HOSIPTAL. MONTGOMERY CONDITION IMPROVED. OFC NICHOLAS FURTHER SEARCH REVEALED AN ADDITIONAL WEAPON (SEE OFC. NICHOLAS SUP. REPORT) OFC GOBLE WITH OFC NEWCOMB AT BOTSFORD HOSPITAL.

SIGNED
INVESTIGATION OFFICER
NEWCOMB

March 19, 1998

Kathryn Montgomery
1502 Harding
Detroit, Michigan 48214

United States Court of Appeals
For the Sixth Circuit
100 East Fifth Street
Room 532
Potter Stewart U.S. Courthouse

Subject: Docket No. 98-1148
Witness for Plaintiff-Appellant

This letter is to certify that I, Kathryn Montgomery, contacted the Farmington Hills Police Department at 10:11 p.m. on November 20, 1997 for the purpose of providing any information or materials necessary for the immediate release of my brother Duane Montgomery, due to the diabetic condition of Duane Montgomery and his need for insulin. As the attached phone bill shows, I contacted the Farmington Hills Police Department by phone number at (248) 474-6181.

Sincerely,

Kathryn Montgomery

March 19, 1998

Doris Hill
120612 Balfour
Apt. 2
Harper Woods, Michigan 48225

United States Court of Appeals
For the Sixth Circuit
100 East Fifth Street
Room 532
Potter Stewart U.S. Courthouse

Subject: Docket No. 98-1148
Witness for Plaintiff-Appellant

This letter is to certify that I, Doris Hill, contacted the Michigan State Police Department on November 20, 1997 at 11:53 p.m. for the purpose of notification that Duane Montgomery was not being allowed to take his diabetic insulin by the Farmington Hills Police Department. I also called the Farmington Hills Police Department at 11:59 p.m. on November 20, 1997 and 12:01 a.m. on November 21, 1997, for the purpose of providing notification of Duane Montgomery diabetic condition and of Duane Montgomery need for insulin. As the attached phone bill shows, I contacted the Farmington Hills Police Department by phone number at (248) 477-0911 and the Michigan State Police at (248) 380-1020.

Sincerely,

Doris Hill

March 19, 1998

Lisa Nieves
P.O. Box 14117
Detroit, Michigan 48214-0117

United States Court of Appeals
For the Sixth Circuit
100 East Fifth Street
Room 532
Potter Stewart U.S. Courthouse

Subject: Docket No. 98-1148
Witness for Plaintiff-Appellant

This letter is to certify that I, Lisa Nieves, contacted the Farmington Hills Police Department at 12:04 a.m. on November 21, 1997 for the purpose of providing notification of Duane Montgomery diabetic condition and Duane Montgomery need for insulin. As the attached phone bill shows, I contacted the Farmington Hills Police Department by phone number at (248) 474-6181.

Sincerely,

Lisa Nieves

March 19, 1998

Desha Hill
20612 Balfour
Apt. 2
Harper Woods, Michigan 48225

United States Court of Appeals
For the Sixth Circuit
100 East Fifth Street
Room 532
Potter Stewart U.S. Courthouse

Subject: Docket No. 98-1148
Witness for Plaintiff-Appellant

This letter is to certify that I, Desha Hill, contacted the Farmington Hills Police Department at 12:19 a.m. on November 21, 1997 for the purpose of providing notification of Duane Montgomery diabetic condition and of Duane Montgomery need for insulin. As the attached phone bill shows, I contacted the Farmington Hills Police Department by phone number at (248) 477-0911.

Sincerely,

Desha Hill

SENDER:
Complete Item 1 and/or 2 for additional services| I also wish to receive the
Complete Items 3,4a,and 4b. | following services (for an
Print your name and address on the reverse of this |extra fee);
form so that we can return this card to you |1. O Addressee's Address
Attach this form to the front of the mailpiece, or on|2. O Restricted Delivery
the back if space does not permit |
Write "Return Receipt Requested" on the mail- | Consult postmaster for fee
piece below the article number. |
The Return Receipt will show to whom the article |
was delivered and the date delivered. |

3. Article Addressed to: |4a. Article Number
FARMINGTON HILLS POLICE | Z-120-158-222
31655 W. 11 MILE |4b. Service Type
FARMINGTON HILLS, MI 48336 |O Registered X Certified
|O Express Mail O Insured
|O Return Recept O COD
| for Merchandise

|7. Date of Delivery
| 11/26/97

5. Received By: (Print Name) |8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Addressee or Agent) |
signed Rush Dowling |

PS Form 3811, December 1994 Domestic Return Receipt

CITY OF FARMINGTON HILLS POLICE DEPT.
31655 W. Eleven Mile Road- Farmington Hills, MI 48338
Phone 474-8181 ORI # MI6338900

NARRATIVE REPORT PAGE 1 OF 1

DATE	DAY	SHIFT	PLATOON	BADGE#	YR	INCIDENT NO.
112197	FRI	03	01	262	97	32240

ON 11-20-97 AT 2245 HRS CADET RADZE ADVISED WRITER THAT PRISONER MONTGOMERY WAS COMPLAINING OF COLDNESS AND NUMBNESS TO LEGS. SHORTLY AFTER ROLL CALL I SPOKE WITH MR. MONTGOMERY WHO ADVISED THAT HE NEEDED TO RETURN TO THE HOSPITAL FOR AN INSULIN SHOT. HIS RELEASE PAPERWORK FROM BOTSFORD HOSP. INDICATES HE WAS TREATED FOR ABDOMINAL PAIN, IT DOES NOT MENTION ANYTHING IN RELATION TO HIS DIABETIC CONDITION. UPON FURTHER QUESTIONING HE INDICATED HE WOULD FINE IF HE HAD AN EXTRA BLANKET AN WAS GOING TO BE RELEASED WITHIN A COUPLE HOURS. MR MONTGOMERY GIRL FRIEND HAD OBTAINED HIS HOUSE KEY AND WAS ENROUTE TO OBTAIN HIS CCW PERMIT. AT APPROX 0115 HRS SHE RETURNED WITH HIS CCW PERMIT #262586 ISSUED THRU WAYNE COUNTY AND AN EXPIRATION DATE OF 7-11-98. SHE ALSO PROVIDED AN EXIPERED PERMIT #198260 (3-10-95) AND A DEPT OF NATURAL RESOURCES EMPLOYEE CARD WITH THE STATE OF MICH. WRITER PHOTOCOPIED THE PERMITS AND ID CARD AND PLACED THEM WITH ARREST REPORT, AT 0130 HRS. SUBJ WAS RELEASED PENDING FURTHER INVESTIGATION WITHOUT INCIDENT.HIS TRACKING FORM INDICATED A SOC SEC. # 386-40-6333 HIS ID. CARD INDICATED A # 377-80-2777. HE INDICATED HE DID NOT GIVE THE BOOKING OFC HIS SOC SEC # AND THAT HE MUST HAVE WROTE THE WRONG # DOWN FROM HIS HAP CARD. OFC

NEWCOMB WAS NOT AVAILABLE TO DETERMINE WHERE HE OBTAINED THE NUMBER.

SIGNED
INVESTIGATION OFFICER
Lt. Pat Browne

HENRY FORD MEDICAL CENTERS

Henry Ford Medical Center
West Bloomfield
Edsel B. Ford Center

March 9, 1998

6777 West Maple Road
West Bloomfield, MI 48322-3031
(248) 661-4100 Office

RE: Duane Montgomery
P.O. Box 251242
West Bloomfield, MI 48322
HFH MRN: 376-41-53-6

To Whom It May Concern:

Duane Montgomery is under my care for diabetes mellitus. He is on insulin and for this reason, he needs to have syringes with him to administer the insulin.

If you have any questions, please do not hesitate to contact me.

Sincerely,

signed Saeed M. Zafar, M.D.
Department of Endocrinology
Henry Ford West Bloomfield Center

SMZ:ak

STATE OF MICHIGAN
DEPARTMENT OF CIVIL RIGHTS
State of Michigan Plaza Building
1200 Sixth Avenue

MDCR NO. 150850-LE66

CLAIMANT:	RESPONDENT:
Perrion L. Robbins	Farmington Hills Police Dept.
ADDRESS:	ADDRESS:
13123 Monica	31655 Eleven Mile Road
Detroit, Mi. 48238	Farmington Hills, Mi. 48336

SUMMARY OF FINDINGS:

The claimant, a Black man, alleged he was treated unfairly by the respondent because of his race.

The respondent denied the claimant's allegations and stated the claimant was treated the same as any similarly situated person in accordance with standard policy and procedures.

The claimant said his vehicle was hit from behind by a white respondent officer on 5-10-96 while he was driving on West Eight Mile Road. The claimant said he was knocked unconscious and had to be taken to the hospital. The claimant said his license, issued in Montana, was confiscated and his car illegally searched by the respondent. He said he was a victim, yet he was given 4 tickets and treated unfairly in court.

The investigation disclosed that an accident occurred on 5-10-96 on westbound Eight Mile Road at Grand River. A White female resident of Southfield was hit from the rear by a Suzuki Jeep. The Jeep is reported to have jumped in front of the vehicle driven by the Southfield resident from the third left-hand lane of Eight Mile Road as she prepared to make a right turn from the turning lane. The Jeep then left the accident scene, veering to the left again and then proceeding east on Eight Mile Road.

Subsequently the Jeep was found about a half mile away in a parking lot of a party store in Southfield. The claimant was the sole occupant of the Jeep at the time it was found. According to two respondent officers the claimant was conscious when found, but told officers at that time, and later while in the hospital, he did not remember anything pertaining to the accident.

While the claimant had a valid Montana driver's license, his Michigan license was found to have been under suspension and had expired in 1990. The Claimant's Montana license was therefore confiscated due to the claimant's unlawful driving status in Michigan.
The claimant was issued violations for improper lane change, driving without a proper Michigan license and leaving the scene of the accident. He was subsequently charged by the court and placed on probation being required to pay part of the other drivers' expenses, court costs and fines. A warrant has been issued for the claimant's arrest due to his violation of probation and failure to pay the required costs and fines.

The claimant did not provide information or evidence in support of his allegations of discrimination by the respondent. A third-party attorney, who had been retained by the claimant to appeal his case, stated she had no evidence that the claimant's rights had been violated in any way. The investigation did not disclose unlawful discrimination by the respondent against the claimant.

It is therefore recommended this complaint be closed for insufficient evidence.

ORDER OF DISMISSAL THIS COMPLAINT IS DISMISSED ON THE FOLLOWING BASIS:

X Insufficient Grounds on which to issue a charge

Date Dismissed: Sep. 29, 1997 Date Mailed: Sep. 29, 1997

Botsford General Hospital Emergency Dept.
28050 Grand River, Farmington Hill, MI 48336 (810)471-8000
Aftercare Instructions

for DUANE MONTGOMERY, Thursday, November 20, 1997,
8:37 pm
(#1414022)

IMPORTANT: We have examined ant treated you today on an emergency basis only. This is not a substitute for, or an effort to provide, complete medical care. In most cases, you must let your doctor check you again. Tell your doctor about any new or lasting problems. It is impossible to recognize and treat all injuries or illnesses in a single Emergency Department visit. If you had special tests such as EKG's and X-rays, we will review them again within 24 hours. We will call you if there are any new suggestions. After leaving, you should FOLLOW THE INSTRUCTIONS BELOW.

You were treated today by Dr. David Walters.

ABDOMINAL PAIN (Belly pain).

Pain in the abdominal may come from one of many problems. Most of these problems, while they may be very painful, will not cause you harm. Almost all will get better on their own. They are often problems such as constipation or a viral infection. In women they can come from the ovaries or nearby areas.

Many times, we do not find the cause of the belly pain right away. The symptoms are the same for many illnesses. Also, people with these problems often have a normal physical exam or lab tests.

It is one of these problems that seems to be causing your pain. It should get better quickly on its own without causing you any harm.

Your symptoms, examination and lab tests did not show a more serious or harmful cause of the pain. Sometimes though, a more serious illness, such as appendicitis, may act like a less harmful illness early on. For this reason, CALL YOU DOCTOR IF:

- your symptoms change for the worse,
- if you have any new symptoms,
- of if you are not much better in two days.

****

THESE ARE YOUR FOLLOW-UP INSTRUCTIONS!

****

Call as soon as possible to make an appointment to see your doctor in 2 days. You can reach your doctor by calling their clinic phone number.

****

*

PLEASE FOLLOW UP WITH YOUR PHYSICIAN IF NECESSARY
RETURN TO THE EMERGENCY ROOM IF CONDITIONS GET WORSE.

AS ALWAYS, YOU ARE THE MOST IMPORTANT FACTOR IN YOUR RECOVERY. Please follow the instructions above carefully. Take your medicines as prescribed. Most important, see a doctor again as discussed. If you have problems that we have not discussed, CALL OR VISIT YOUR DOCTOR RIGHT AWAY. If you can't reach you doctor, return to the Emergency Department.

"I understand the instructions above, and discussed in the Emergency Department."

signed Duane Montgomery
Patient or Responsible Person

signed Theres Dor****
Witness

SEATBELTS.

There is no doubt that seatbelts save lives. Every day in the Emergency Department we see how people without seatbelts are more severely hurt. We always buckle-up! Please do the same!

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUANE MONTGOMERY, CASE NO.:97-CV-75838-DT

Plaintiff, HON. PATRICK J. DUGGAN

vs.

CITY OF FARMINGTON HILLS and
FARMINGTON HILLS POLICE DEPARTMENT,

Defendants.
_____/

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF'S MOTION TO STRIKE AFFIDAVITS AND VIDEO TAPE EXHIBIT

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on August 11, 1998

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

The instant action arises from two instances in which plaintiff was arrested by Farmington Hills police officers. Currently before the Court are cross motions for summary judgment.[1] For the reasons discussed in this Opinion and Order, defendants' motion for

summary judgment is granted and plaintiff's motion for summary judgment is denied.

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[1] Also before the Court is plaintiff's motion to strike certain affidavits and a video tape exhibit pursuant to Fed. R. Civ. P. 26(g). The Court sees no basis in Rule 26(g) (which requires that an attorney sign all discovery disclosures, requests, responses or objections) for striking the affidavits and videotape. Therefore, plaintiff's motion is denied.

Background

On Saturday, April 13, 1996, plaintiff was driving a car on Farmington Road in Farmington Hills, Michigan. Madeleine Zimmer, a Farmington Hills police officer, stopped plaintiff for traveling (according to Zimmer's report) 56 miles per hour in a forty mile per hour zone. (Def. Ex. 2.)

Officer Zimmer claims that she requested proof of insurance and the car's registration, but plaintiff was unable to produce these documents. She then observed a "fanny pack" on the plaintiff's waist, which appeared to be of the variety used by off duty police officers to carry firearms. Zimmer claims that she then asked plaintiff if he had a firearm in his possession. Plaintiff said, "yes." Zimmer then ashed him the name of his employer, and plaintiff answered "the State," although he did not provide any additional information on this topic. Zimmer called for backup. Officer Woodmore and Sergeant Summers then arrived at the scene. Plaintiff refused to comply with orders to shut off his car or to step out of his car. Eventually, Officer Zimmer held plaintiff at gunpoint while Officer Woodmore and Sergeant Summers assisted him out of the car. A search was then conducted of plaintiff, yielding a .390 caliber pistol located in an ankle holster, a .50 caliber pistol located in the fanny pack, and ammunition for both guns. Plaintiff had a concealed pistols license, but it was restricted to "business only" use while working for a company known as Engineering Technologies. The officers were uncertain about plaintiff's place of employment because, although he stated that he worked for the State, he did not elaborate on this issue; furthermore, his pistol license mentioned a company known as Engineering Technologies, and the officers found identification

cards for Detroit Edison and the Michigan Department of Natural Resources in plaintiff's wallet. (Ex. 6.) The officers also learned that there was a warrant for plaintiff's arrest. Plaintiff was then arrested on the warrant, as well as on charges of carrying concealed weapons and failing to obey a police officer's order. Plaintiff was also ticketed for speeding and for not having proof of insurance or a certificate of registration. The concealed weapons charge was dropped by the Oakland County Prosecutor, but a misdemeanor complaint was issued for interference with a police authority. (Def. Ex. 7.) Plaintiff was found guilty by a jury on March 18, 1997 on this charge and was ordered to pay fines and costs totaling $200.00 and received a sentence of 10 days in jail.

Plaintiff has not presented any evidence disputing defendants' version of the April 13, 1996 incident. However, he claims that his speed was a "pretense" for stopping him, and he argues that the Farmington Hills Police Department has a policy of unconstitutionally targeting African Americans.[2]

On November 20, 1997, plaintiff was again stopped by the Farmington Hills Police. This stop apparently occurred in the evening time. Plaintiff was traveling down Orchard Lake Road in Farmington Hills, when he was observed by Officers David Newcomb and Paul Nichols. According to the officers, they noticed that the plaintiff's license plate was improperly displayed in his rear window, rather than being attached to his rear bumper. In addition, one of the numbers on the plate was blocked by the third taillight. This caused Nichols to run the wrong number on his computer, which returned no registration.[3] The officers then stopped plaintiff. Upon the officers' request, plaintiff produced a registration for the vehicle and an Ohio diver's license. A search of the Law Enforcement Information Network ("LEIN") revealed that plaintiff's Michigan driver's license had been suspended, apparently for unpaid traffic tickets. Plaintiff was then arrested for driving on a suspended Michigan driver's license. When asked whether he had any weapons, plaintiff answered "no, not on me." The officers conducted an inventory search of the car and found two handguns. Plaintiff claimed that he had a concealed weapons permit, although he did not have it on him at that time.[4] On the

way to the station, plaintiff advised the officers that he was a diabetic and that he needed insulin. Plaintiff was transported to the hospital, where he received treatment and was then taken to the station at approximately 8:37 p.m. At approximately 10:45 p.m., plaintiff told Sergeant Robert Burkhart that he felt cold and numb and that he needed to return to the hospital for an insulin shot. (Def.'s Ex. 14.) Burkhart indicated on his report that the hospital paperwork, (Def.'s Ex. 13), indicated abdominal pain and did not mention a diabetic condition. According to Burkhart's report, plaintiff indicated that he would fine if he were provided with an extra blanket and soon released. Plaintiff was released at 1:30 a.m. on November 21, 1997.

Plaintiff acknowledges that he was treated for pain related to his diabetes at the hospital and that the doctor told him that if the pain returned, he should return to the hospital.

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[2] Plaintiff is an African American

[3] The car was in fact registered under the correct license plate number.

[4] This license had actually been suspended by the Wayne County Concealed Weapons Licensing Board due to plaintiff's failure to appear for a hearing based on the circumstances of the April 13, 1996 arrest. Plaintiff claims that he never received notice of the suspension.

Plaintiff claims that the police officers ignored his requests to return to the hospital.

Plaintiff filed a pro se complaint on November 25, 1997, which asserted that defendants violated his rights under the Fourth, Sixth, and Eighth Amendments to the United States Constitution.

Standard of Review

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears

the burden of informing the court of the basis for his or her motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986). The movant must demonstrate either the absence of a genuine issue of fact or the absence of evidence supporting the nonmoving party's case. *See id.* At 325, 106 S.Ct. at 2554. Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* At 322, 106 S. Ct. at 2552. The substantive law identifies which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). "The district court is not to make credibility determinations or weigh the evidence" upon a motion for summary judgment. *Adams v. Metiva*, 31 F.3d 375, 384 (6th Cir. 1994) (citing *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513).

When determining whether there is a genuine issue for trial, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962); *accord Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). "Although [the nonmoving party] is entitled to a review of the evidence in the light most favorable to him or her, the nonmoving party is required to do more than simply show that there is some "metaphysical doubt as to the material facts." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994) (quoting Matsushita, 475 U.S. at 586, 106 S. Ct. at 1356). Rule 56(e), "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553 (quoting Rule 56(e)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512.

Discussion

Defendants argue that summary judgment is warranted because plaintiff cannot produce evidence sufficient to establish their liability under 42 U.S.C. § 1983 for the alleged violations of the plaintiff's constitutional rights.

Municipalities are "persons" subject to suit under § 1983.[5] *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035-36, 56 L. Ed. 2d 611 (1978); see *also Garner v. Memphis Police Dep't,* 8 F.3d 358, 363 (6th Cir. 1993). However, a municipality cannot be held vicariously liable for the conduct of its employees. *See Monell*, 436 U.S. at 691, 98 S. Ct. at 2036. A municipality can be held directly liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694, 98 S. Ct. at 2037-38. Thus, the plaintiff must "identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy." Garner, 8 F.3d at 364 (quoting Coogan v. City of Wixom, 820 F.2d 170, 176 (6th Cir. 1987)). [A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." Bd of County Com'rs of Bryan County, Okl. V. Brown, 520 U.S. 397, 117 S. Ct. 1382, 1390, 137 L. Ed. 2d 626 (1997). "The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. " City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412 (1989).

5"A municipal police department is not a legal entity separate from its parent city. To name the Department as a separate defendant is redundant." Damron v. Pfannes, 785 F. Supp. 644, 646 (E.D. Mich. 1992). Therefore, the Court grants defendants' motion with

regard to plaintiff's claims against the Farmington Hills Police Department.
Plaintiff claims that Farmington Hills failed to train its employees to provide medical aid or treatment to pretrial detainees. Plaintiff also claims that Farmington Hills had a policy of targeting African Americans.

Plaintiff has produced no evidence showing the Farmington Hills failed to train its officers with respect to providing prisoners with medical treatment or that the lack of such training amounted to deliberate indifference. Plaintiff cites Ziegler v. City of Farmington Hills Police Dep't, No. 89-1981, 1990 WL 58397 (6th Cir. May 4, 1990) and Willing v. City of Farmington Hills, 159 Mich. App. 366 (1987). These cases do not help plaintiff's case. In Ziegler, the Sixth Circuit affirmed the district court's dismissal of the plaintiff's claim of deliberate indifference to his medical needs because there was no indication in the complaint that Farmington Hills had an improper policy or custom under *Monell*. In Willing, the Michigan Court of Appeals did not reach the *Monell* issue.

Defendant has also failed to produce evidence showing a policy of targeting African Americans. In an attempt to show that Farmington Hills had a policy of targeting African Americans, plaintiff has produced a report of the State of Michigan Department of Civil Rights concerning a claim made by Perrion L. Robbins that the Farmington Hills Police Department treated him unfairly due to his race. (Pl. Ex. M.) The report recommended that the complaint be closed due to lack of evidence. This report, which involved the complaint of a single individual and which apparently did not result in any action against the Farmington Hills Police Department, is devoid of any indication that Farmington Hills actually had a policy of targeting African Americans.

Accordingly, for the reasons stated in this Opinion and Order,

IT IS ORDERED that the defendant's motion for summary judgment is **GRANTED** and plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion to strike affidavits and video tape exhibit is **DENIED**.

Stamped: PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

Duane Montgomery
c/o ETR, Inc.
33523 Eight Mile Rd. ,Ste 108, Bldg. A-3
Livonia , MI 48152

Michael E. Rosati, Esq.
34405 W. Twelve Mile Rd. Ste. 200
Farmington Hills, MI 48331

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUANE MONTGOMERY

Plaintiff

vs.

Case No. 97-75838
Hon. Patrick Duggan

CITY OF FARMINGTON HILLS and
FARMINGTON HILLS POLICE DEPARTMENT,

Defendants

_____/

DUANE MONTGOMERY, Plaintiff, In Pro Per
c/o ETR, Inc., 33523 Eight Mile Road
Suite 108, Bldg A-3
Livonia, Michigan 48152
(800) 950-4387

JOHNSON, ROSATI, GALICA, LaBARGE,
ASELTYNE & FIELD, P.C.
BY: MICHAEL E. ROSATI (P34236)
Attorney for Defendants
34405 W. Twelve Mile Road, Suite 200
Farmington Hills, MI 48331-5627
(248) 489-4100

_____/

DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES TO DEFENDANTS

For the purpose of requesting the District Court to issue subpoena and for them to be served correctly, please provide the

complete names and addresses and all documents related to their detainment, by the Farmington Hills Police Department, of the persons listed below:

1. John Doe #1, black male sharing cell with Plaintiff on November 20, 1997 in Farmington Hills Police station.
2. John Doe #2, black male sharing cell with Plaintiff on November 20, 1997 in Farmington Hills Police station.
3. All additional John Doe(s) in the custody of the Farmington Hills Police Department during the time period of 5:30pm on November 20, 1997 through 2:00am on November 21, 1997.

ANSWER: Defendants object to providing documents regarding these individuals, as those documents are privileged, and not subject to discovery. Moreover, the documents requested are irrelevant, and will not lead to relevant evidence in this case. Further, the request for all documents regarding these individuals is over broad, and impinges on the privacy of these individuals. Subject to that objection, see attached Exhibit A, a list of persons detained around the time of the Plaintiff's detention as best as can be reconstructed at this time.

For the purpose of requesting the District Court to issue future subpoena and for allowing for the witnesses to be served correctly, please provide the complete names and addresses and complete medical training history and total years of police/medical work

experience, and any complaints from any agency or persons that have been filed against any of the persons listed below:

4. Farmington Hills Cadet Haze listed on incident report 97-32240.
5. Farmington Hills Desk Supervisor, writer of narrative report for incident 97-32240, badge # 262.
6. Farmington Hills Officer Newcomb listed on incident report 97-32240.
7. Farmington Hills Officer Nicholas listed on incident report 97-32240.
8. Farmington Hills Officer Goble listed on incident report 97-32240.
9. Farmington Hills Officers Brown, badge # 205 listed on property report for incident 97-32240.
10. Person identified as C.S.O. John Hardy listed on property report for incident 97-32240 written by Officer Brown, badge # 205.
11. Farmington Hills Officers R. Tiderington # 57.
12. Farmington Hills Officer, Zimmer badge # 11 of platoon 5 in incident 96-9797.
13. Farmington Hills Officer C. Summers listed on incident report 96-9797.
14. Farmington Hills Officer D. Woodmore listed on incident report 96-9797.

ANSWER: Defendants objects to providing the information requested regarding the police officers listed here. The request is

over broad, as it includes persons who are not involved in any manner with the Plaintiff regarding the items which are subject to Plaintiff's Complaint. Further, much of the information requested is privileged, and not subject to disclosure under either state or federal law, including the addresses of the individuals listed. Finally, the information requested in irrelevant, and will not lead to relevant evidence in this case. Subject to those objections, Defendants have attached a training list for the individuals listed in this Interrogatory as Exhibit B.

For the purpose of entering the items into record as exhibits, please provide the information listed below:

ANSWER: Defendants will respond to the individual requests as follows:

15. Copies of all complete 8 hour video and audio tapes for police incident # 96-9797 and # 97-32240 including tapes from the "Mug" room, Cell room or Holding room and all police cars involved, including tape from Officer Nicholas vehicle and Officer Goble.

ANSWER: Defendants will provide video tapes from the patrol car for the 1996 incident. Defendants do not retain any other video tapes beyond a specified period of time, and all the other video tapes would have been overwritten. Defendants will provide video tapes from partrol vehicles, as well as the booking area for the

1997 incidents. All tapes will be provided after payment of copying costs.

16. Please provide copies of any audio communication or transcribed text communications between the Farmington Hills Police dispatcher and Officer Newcomb and/or Officer Nicholas and between Officer Newcomb and Officer Nicholas, during the trailing of the Plaintiff vehicle during incident #97-32240.

ANSWER: Defendants will provide copy of the dispatch tape for the 1997 incident after payment of copying costs.

17. Please provide copies of any audio communication or transcribed text communications between the Farmington Hills Police dispatcher and Officer Zimmer and/or Officer Summers and between Officer Summers and Officer Zimmer, during incident # 96-9797.

ANSWER: Any such tape regarding the 1996 incident has not been retained, and cannot be provided. The tape was recycled pursuant to policy regarding reuse of dispatch tapes.

18. Please provide photographs for the rear, front, left side and right side of the police vehicle used by Officer Zimmer during police incident # 96-9797.

ANSWER: Defendants object to providing photographs as requested in this item, as it requires Defendants to take

photographs for the Plaintiff, as these items do not exist, and this is not a proper discovery request.

19. Please provide photographs for the rear, front, left side and right side of the police vehicle which appears to be a black GM Chevy Camero with tinted windows.

ANSWER: Defendants object to providing photographs as requested in this item, as it requires Defendants to take photographs for the Plaintiff, as these items do not exist, and this is not a proper discovery request.

20. Please provide photographs for the rear, front, left side and right side of the police vehicle used by Officer Newcomb during police incident # 97-32240.

ANSWER: Defendants object to providing photographs as requested in this item, as it requires Defendants to take photographs for the Plaintiff, as these items do not exist, and this is not a proper discovery request.

21. Copies of all documents related to any internal or external investigations performed by the Farmington Hill Police Department or by the City of Farmington Hills, in regards to incident # 96-9797 and # 97-32240.

ANSWER: Defendants object to providing any internal investigations regarding the 1996 or 1997 incidents, as those itmes would be privileged and not subject to disclosure in this case.

Defendant does not understand the term "external investigations", but believes that any such documents would be equally available to Plaintiff by way of subpoena of the investigating agency. Defendant knows of no investigations conducted except possibly an investigation by the Civil Rights Department, and Defendant is informed the Plaintiff already has subpoenaed this agency and received all documents from that agency.

22. Copies of all documents related to any internal or external investigations performed by the Farmington Hill Police Department or by the City of Farmington Hills, in regards to the arrest and detainment of former employee Ms. Gayna Willing somewhere between time period of 1985 to 1990.

ANSWER: Defendants object to providing these items as they are irrelevant and will not lead to relevant evidence in this case. There is no similarity between the Willing matter and the incidents complained of in this case, nor is there any connection between the two matters.

23. Copies of all documents related to any internal or external investigations performed by the Farmington Hill Police Department or by the City of Farmington Hills, in regards to the arrest and detainment of Mr. Joseph Ziegler in 1989.

ANSWER: Defendants object ot providing these items as they are irrelevant and will not lead to relevant evidence int his case. There is no similarity between the Ziegler matter and the icidents

complainted of in this case, nor is there any connection between the two matters.

24. Copies of all documents and exhibits to be used by the Defendants in the defense of this civil complaint.

ANSWER: Defendants have not yet determined what documents and exhibits will be used at trial in this matter, but reserve the right to use anything that is revealed in discovery, including the video tapes and reports or transcripts. They will supplied pursuant to the final pretrial order.

25. Copies of any documents pertaining to any communications made to the Lansing Police during the detainment of the Plaintiff in incident # 96-9797 and the transfer of the Plaintiff to the custody of Lansing Police. Please include the date and time the Plaintiff was released to the Lansing Police Dept.

ANSWER: Aside from the LEIN record, Defendants know of no other communcations. See attached.

26. Copies of any audio telephone recordings of telephone calls received between 6:00pm on November 20, 1997 and 3:00am on November 21, 1997 in regards to Duane Montgomery, incident # 97-32240.

ANSWER: Defendant is still searching to see it these recordings exist. These will be supplied if available upon payment of copying costs.

The above statements are true to the best of my information, knowledge and belief.

_____

LT. PAT BROWN
Farmington Hills Police Department
Dateed:
JOHNSON, ROSATI, GALICA,
LaBARGE, ASELTYNE & FIELD, P.C.

signed Michael E. Rosati
BY: MICHALE E. ROSATI (P34236)
Attorney for Defendants
34405 W. Twelve Mile Road, Suite 200
Farmington Hills, Michigan 48331-5627
(248) 489-4100

PRISONER IN CUSTODY

MASON, Dione Marcell B/M Cell A-3
14563 Coyle St.
Detroit, Mi 48227
TX: 313-273-8836 Lodged 11/20/97 1400 to 11/20/97 1940

BELIN, Earl Clayton B/M Cell A-1
15751 Cruse St.
Detroit, Mi 48227
TX: 313-270-2991 Lodged 11/20/97 1430 to 11/20/97 1900

HILL, Kevin Robinson W/M Cell A-2
8039 Carpenter
Ypsilanti, Mi
TX: None Lodged 11/20/97 1500 to 11/21/97 1200

ORTIZ, Elias Sr. W/M Cell A-1
Inkster
Southfield, Mi
TX: None Lodged 11/20/97 1840 to 11/21/97 2330

RODGERS, Diane Carlie B/F Cell B-3
18027 Kentucky
Detroit, Mi 48221
TX: 313-922-4423 Lodged 11/20/97 1120 to 11/21/97 2330

WILLIAMS, Willie Edward B/M Cell A-2
18475 Lauder
Detroit, Mi 48235
TX: 313-272-1965 Lodged 11/20/97 1430 to 11/20/97 1700

MAY, Michael Joseph W/M Cell C-1

31270 Portside # 1105
Novi, Mi 48377
TX: 248-669-9013 Lodged 11/20/97 1505 to 11/21/97 1200

DUNN, Anthony Thermae B/M Cell A-3
3017 Oakman Blvd.
Detroit, Mi 48238
TX: 313-895-2674 Lodged 11/20/97 1715 to 11/21/97 0200

IVEZAJ, Vasel W/M Not Lodged
6268 Timberwood
West Bloomfield, Mi 48223
TX: 248-788-7150 Lodged 11/20/97 2300 to 11/20/97 0000

BECKWITH, Donald Harold B/M Cell A-3
30150 Nine Mile # 120
Farmington Hills, Mi
TX 248-471-6166 Lodged: 11/19/97 1815 to 11/20/97 2220

sampled DEFENDANT'S EXHIBIT A

OFFICERS/CIVILIANS
HIRED DATES, MEDICAL TRAINING

- These officers/civilians do not have any medical experience
- Department training records only go back to 1988
- Citizen complaints that are unfounded are not kept in officers files and they are listed on microfilm only by the complainants name. None of theses officers/civilians have had any substantiated citizen complaints filed against them.

Cadet Andrius Radze
Farmington Hills Police 2/18/97 - Present (15 months)
Medical Training - None

Ofc. David Newcomb
Huron Twp. Police 9/94 - 7/97
Farmington Hills Police 7/14/97 - Present (10 months)
Medical Training -
CPR 1/98

Ofc. Paul Nicholas
Lake Orion Police Part-time 7/94 - 12/94
Farmington Hills Police 12/19/94 - Present (3 yrs. 5 months)
Medical Training -
CPR 2/98
First Aid 2/96

Ofc. Rick Goble
Farmington Hills Police 8/2/89 - Present (8 yrs. 9 months)
Medical Training -
CPR 11/89, 4/93, 12/95, 2/98
First Aid 11/89, 4/93, 12/95

Lt. Pat Browne
Detroit Police 1972-1978
Farmington Hills Police 8/25/78 - Present (19 yrs. 9 months)
Medical Training-
CPR 5/88, 10/89, 10/91, 4/93, 12/95, 11/97
First Aid 3/88, 10/89, 4/93, 12/95

CSO John Handy
Franklin Police Reserve - 9 years
Farmington Hills Police 7/15/96 - Present (1 yr 10 months)
Medical Training - None

stamped DEFENDANT'S EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

v No. 98-157635-FH

DUANE MONTGOMERY,

Defendant.
_____/

EVIDENTIARY HEARING

Before HONORABLE JESSICA R. COOPER, Judge

Pontiac, Michigan - Tuesday, June 30, 1998

APPEARANCES:

For the People: Mr. David J. Selwocki (P51375)
ASSISTANT PROSECUTING ATTORNEY

1200 Telegraph Road
Pontiac, MI 48341-0404
(248) 858-8991

For the Defendant: Mr. Cornelius Pitts (P18930)
3650 Penobscot Building
Detroit, MI 48226-4218
(313) 964-0066

Court Reporter: Karen C. Hollen (CSR-0696)

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EXHIBITS

EXHIBIT NO.		MARKED	RECEIVED
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Pontiac, Michigan
Tuesday, June 30, 1998
About 10:00 a.m.

- - -

THE CLERK: Calling 98-157635-FH, People of the State of Michigan versus Duane Montgomery.

MR. SELWOCKI: David Selwocki on behalf of the People, Your Honor.

MR. PITTS: Good morning, Your Honor. Cornelius Pitts appearing on behalf of the Defendant, Mr. Duane Montgomery.

THE COURT: And this matter is set for an evidentiary hearing, is that correct?

MR. PITTS: I understand that this is the continuation of what I believe is a separate part of an evidentiary hearing dealing with the seizure of--

THE COURT: Is there another one that I can call while we're waiting? Is there another one that is supposed to go?

MR. SELWOCKI: Yes.

(Unrelated matter heard by the Court)

THE CLERK: Recalling 98-157635-FH, People of the State of Michigan versus Duane Montgomery.

MR. SELWOCKI: David Selwocki on behalf of the People, Your Honor.

MR. PITTS: Cornelius Pitts, once again, Your Honor, on behalf of the Defendant.

THE COURT: Now, are all the papers that are necessary for this hearing now present in the court?

MR. SELWOCKI: Not all the documents that Mr. Pitts would like, but I am informed they are being faxed to my fax machine in the office now and they should be on their way over.

THE COURT: Can we proceed without them or would you care to wait?

MR. PITTS: I have no problem with proceeding, but before doing that, Judge, let me also offer another factor, and that's this.

With that having been said, Judge, let me suggest that there's another factor to be considered, and that's this. It's my understanding that before the inventory is implemented and before the impounding is actually executed, there has to be a basis upon which the impounding takes place. That is, there has to be a reason for the impounding of the vehicle. The government has provided me, and by that I mean the State government and the Prosecutor's office, has provided me with what is known as, I guess, a form, Farmington Hills Police General Order, and it's dated February 5th of 1998. That is a six-page document which supposedly covers the circumstances under which vehicles are allegedly impounded and the procedure for doing so.

With the Court's permission, I'd like to approach the Court and show her this particular document.

THE COURT: Do you want to have it marked and use it as an exhibit?

MR. PITTS: Yes. And it can be marked as both People's and Defendant's exhibit.

MR. SELWOCKI: That's fine.

MR. PITTS: And I think it's important to notice that the date on this general order is February 5th.

(Proposed Joint Exhibit 1 marked)

MR. PITTS: Judge, you will notice that that's dated February 5th of 1998, and the incident involved occurred in November, I think, November of 1997.

Now it may very well be that the rules that were in existence in 1997 are identical with those that are allegedly attributed to that general order of February 5th, 1998.

THE COURT: You want the '97?

MR. PITTS: That's what we're waiting for.

THE COURT: Okay.

MR. PITTS: But let me, if I may for purposes of this argument, use this as the document that I think covers the procedure.

I think if the Court will turn to page 4 of that

document you will see, I think, the basis upon which the People--and certainly Mr. Selwocki can speak for himself and the government--used as the basis of the impounding. And I think if you look at page 4, you'll see indeed it's paragraph 5 of this order, subparagraph B, when it talks about taking a vehicle into police custody, and arrangements cannot be made by the arrestee to properly remove and/or secure the vehicle.

Then in subparagraph C it talks about when a driver is suspended, revoked, or denied--which may very well be this situation--and then in paragraph D it talks about when the occupants in the vehicle are arrested on controlled substances.

For purposes of this argument, I'd like to know from the government which one of these particular paragraphs are they saying justifies supposedly the impounding of the vehicle.

THE COURT: Your argument then, sir?

MR. SELWOCKI: My argument would be twofold, Your Honor. I believe both B and C apply. I don't think I need to distinguish between the two. If you look at B, when a driver is taken into police custody and arrangements cannot be made to properly remove and/or secure the vehicle it shall be impounded. That happened in this case because the proofs are, and I don't think there is any contesting this, that the driver was alone. They're not to leave a car sit there, take him back somewhere and see if he can call and find out if somebody can take care of it. They're liable for that car the entire time, that's why they have these procedures.

THE COURT: Is it and/or?

MR. SELWOCKI: Correct.

MR. PITTS: Okay, fine. I just want to listen to him complete his argument, then I'll expound.

MR. SELWOCKI: And C, which is probably the most applicable in this particular case, and I'm sure what the officer inventoried it for, is when a driver is

suspended, revoked or denied the vehicle they are in custody of shall be disposed of by complying with department training and information bulletin TB2393, which is on its way over here, which basically states that if somebody is suspended and the car is registered to them, you take the car so when they're released they don't go back and get the car and drive it. That's my understanding. But I would say that both of those apply.

MR. PITTS: Okay. First of all, taking it in inverse order, it would seem to me that if indeed--

THE COURT: You need to look at TB2393.

MR. PITTS: If that indeed is the one that they're alleging justifies when the driver is involved. Because if you look at the other paragraph, Judge, if I'm not mistaken, I don't think the gun falls into the contraband category. I think we're talking about the contraband.

THE COURT: So we're not talking about B, we're talking about D and C.

MR. PITTS: Yes, you'd have to be talking about B and C. And indeed, if we're talking about B and C, we'd want to know indeed what the justification is for that, that is, taking the vehicle into custody.

MR. SELWOCKI: I'm sorry, I didn't hear the question. I apologize.

THE COURT: He wants to know what the justification is. I assume that's the whole essence of the hearing.

MR. SELWOCKI: Yes. I mean, I don't understand-- are we skipping the hearing and stipulating to facts and going right to argument?

THE COURT: Well, I don't know if he'll stipulate. Maybe if he accepts your argument, then we won't have a hearing. I don't know.

MR. SELWOCKI: I don't think Mr. Pitts will accept any argument.

MR. PITTS: That may very well be true. But I

think we need to have that training bulletin, which I think explains--

MR. SELWOCKI: I concur. I have no objection to that.

THE COURT: I'm happy to wait. We've been waiting this long, I guess we'll wait just a little bit longer. Why don't you call your office and see if it's on its way.

MR. SELWOCKI: Thank you, Your Honor.

THE COURT: We'll be in recess again. Let me know when you're ready.

(Brief recess taken about 11:00)

THE COURT: Now, do we have all the packets?

MR. SELWOCKI: Do we have all the packets? Okay, here we go. This is the new one; here is the old one. Do you want to have this marked as our exhibit?

This, Your Honor, is the inventory guidelines that were in effect during the date in question.

(Proposed Joint Exhibit 2 marked)

THE COURT: That's a stipulated exhibit then, Mr. Pitts?

MR. PITTS: That is correct, Judge.

MR. SELWOCKI: I'm ready to proceed, Your Honor.

THE COURT: You're going to mark that exhibit and not give it to me?

MR. SELWOCKI: I just need to look at it real quick, Your Honor. We only have one copy of this one.

THE COURT: All this time, we don't have copies? Let's start because I have a judge's meeting to go to.

MR. SELWOCKI: What time is the judge's meeting?

THE COURT: About 17 minutes.

MR. SELWOCKI: Do you want to start this at 1:30?

THE COURT: Well, no, I'd like to use as much time as we can.

MR. PITTS: Fine. Judge, you'll notice, if I can continue the argument, that the one that you have for 1997--

THE COURT: I have--the one in front of me is 1998.

MR. PITTS: I thought Mr. Selwocki was going to

have it marked and entered.

MR. SELWOCKI: It is marked, it is entered. A sticker should be on there somewhere.

MR. PITTS: May I approach the Bench, Your Honor?

You'll notice on page 6 of the fax, page 3 of the document for 1997, it gives the three circumstances under which the car is supposed to be--can be impounded for an arrest and/or road hazard. It gives A, B and C.

THE COURT: Yes.

MR. PITTS: Now, you can compare that A, B and C and the document that you have in your right hand with the one that you have in your left hand for 1998 which gives A, B, C and D.

THE COURT: Okay. They took off D.

MR. PITTS: Okay. So 1997 deals with A, B and C, and B being when a driver is taken into police custody and arrangements cannot be made by the arrestee.

THE COURT: Oh, you know what they took off? They took off C.

MR. SELWOCKI: Right. They just changed the lettering, Your Honor. C is the one that dealt with training, something or another, dealing with suspension of license.

THE COURT: So we're down to--

MR. PITTS: Just B.

THE COURT: --just B.

MR. PITTS: Now notice, Judge--and again, we began this argument, limited as it may be, with reference to the circumstances under which the vehicle should be impounded; not dealing with the procedure of the impoundment, but the initial circumstances. Do you follow me, Judge?

THE COURT: Mm-hmm.

MR. PITTS: Okay. And the government is relying upon B, it has to be B. Judge, take a look at the transcript, and we will stipulate--Mr. Selwocki, do you have any problem stipulating that the transcript of the preliminary examination constitutes a complete record of what transpired and indeed the testimony of the officers

regarding the impounding of the vehicle as well as the seizure of the evidence?

MR. SELWOCKI: No, because we didn't go into that that much at the time. We're now talking about--I think we should hold the hearing, Judge. It won't take that long.

MR. PITTS: Okay. I have no problem with holding the hearing. Except you will notice that indeed one of the conditions for the impounding of the vehicle is notification to other individuals. Look at B.

THE COURT: I've got B. You want me to look at the transcript?

MR. PITTS: It says arrangements cannot be made by the arrestee.

THE COURT: I see it.

MR. PITTS: There are no efforts made in that transcript to have somebody come in and take that vehicle. Now of course, six months later when we had this hearing and during this argument while the officers are present, it may very well be these things may come up, I don't know. That's number one.

And the other factor is that the vehicle is on a private parking lot, or private parking commercial establishment and indeed, there is nothing in that particular record to show that the complaint has been made by the private person supposedly for the impounding of the vehicle.

THE COURT: Impoundment is from private property without police order?

MR. PITTS: Yes.

THE COURT: All right. So we're only talking about B?

MR. PITTS: That's right.

MR. SELWOCKI: There's also some--in talking with the officer, this is their main impounding inventory guidelines. However, they also use some training--

THE COURT: There's more that needs to be faxed?

MR. SELWOCKI: No, there's also some training

bulletins in there. It's my understanding that their procedures were, and that's what the hearing will bear out, that even--that that does apply and we still hold true to that, as well, but also, even though that paragraph that was in the '98 version was added, they did that back in '97, also, the standard operating course of procedure when they were suspended pursuant to some training bulletins that they had at that time.

MR. PITTS: I don't care what they did. The question is whether or not it's authorized and the question is what is the authority and indeed the responsible document authorizing that particular conduct. We have to rely upon the written word. Just as the Court speaks through its written orders, that's what they have to indeed, I think, comply with. Not practice, they have to comply with indeed what is authorized.

THE COURT: Well, I don't need to comply with. We need to make a record.

MR. SELWOCKI: I'm ready. What I'll do to expedite the record, at this time I'm just going to call Officer Nicholas to the stand.

THE COURT: Would you come forward, please, sir? Would you raise your right hand?

Do you solemnly swear or affirm the testimony you are about to give is the whole truth and nothing but the truth?

MR. NICHOLAS: I do.

MR. SELWOCKI: Officer Newcomb has just stepped outside pursuant to a sequestration request by Counsel.

PAUL NICHOLAS

called by the People about 11:45 a.m., sworn by the Court, testified:

DIRECT EXAMINATION

BY MR. SELWOCKI:

Q Please state your full name and spell your last name for the benefit of the court reporter.

A Paul Nicholas, N-i-c-h-o-l-a-s.

Q Where are you employed?
A Farmington Hills Police Department.
Q Were you so employed on November 20, 1997 around 6:00 p.m.?
A Yes, I was.
Q What were you doing?
A On patrol.
Q Around the 6:00 p.m. time frame, were you in the area of, I believe it was, Orchard Lake at Thirteen Mile?
A Just north of, yes.
Q What road were you actually on?
A I was just south of Fourteen Mile on Orchard Lake Road.
Q And were you in a fully marked patrol car?
A Yes, I was.
Q Were you in uniform?
A Yes.
Q Were you operating by yourself?
A Yes.
Q What happened around 6:00; did you initiate any stops or did anything happen that you got involved in?
A I observed a vehicle with what I perceived as a traffic violation.
Q What would that traffic violation be?
A Improper display of license plate.
Q Would you explain to the Court what was improper about the license plate?
A The license plate was propped up in the back window of the vehicle, partially obscured. You couldn't see the license plate properly because the third brake light was covering part of it.
Q Was that considered an improper plate?
A Not an improper plate, but an improper display.
Q What happened at this point?
A Officer Newcomb was in the area and another patrol vehicle was to my left in the lane behind the vehicle that had the improperly displayed license plate. I sent an MDT message to Officer Newcomb--
Q What's an MDT message?

A The computer--mobile data terminal in the vehicle. Officers can send messages to each other via these computers. I had sent one to Officer Newcomb stating my observations and asked him if I would stop that vehicle for that traffic violation.
Q And did he stop that vehicle?
A Yes, he did.
Q Did you also stop?
A Yes, I did.
Q What happened next?
A We exited our patrol vehicles, approached the suspect's vehicle, myself on the passenger side and Officer Newcomb on the driver's side.
Q And do you see the person in that vehicle in court today?
A Yes, I do.
Q If you could point to him and identify something he's wearing?
A The gentleman in the green jacket.
MR. SELWOCKI: Let the record reflect that the witness has identified Mr. Duane Montgomery, the Defendant in this matter.
THE COURT: So indicated.
MR. SELWOCKI: Thank you, Your Honor.
BY MR. SELWOCKI:
Q Was he alone in that car?
A Yes.
Q What happened next?
A Identification, vehicle registration was obtained by Officer Newcomb. We went back to my patrol vehicle and checked his information through the mobile data terminal, checked the driving status for warrants.
Q And what was determined?
A That his Michigan driver's license was suspended.
Q So he was driving while suspended?
A That's correct.
Q And what did you do at this point?
A Re-approached the vehicle.
Q Who?

A We, Officer Newcomb and myself, re-approached the vehicle, Officer Newcomb on the driver's side and myself on the passenger side. We had Mr. Montgomery step from the vehicle. Officer Newcomb took him into custody for driving on a suspended license.
Q And where did he take Mr. Montgomery?
A To his patrol vehicle.
Q What did you do at this point?
A After Mr. Montgomery was secured in the back of Officer Newcomb's patrol vehicle, I began a search of Mr. Montgomery's vehicle.
Q And why did you begin that search?
A Mr. Montgomery was taken into custody out of his vehicle after an arrest. His vehicle also was going to be impounded.
Q Why was it going to be impounded?
A There was no one to take custody of the vehicle. The policy of our police department is that if a suspended driver is arrested out of their vehicle, a vehicle registered to them, for driving on a suspended license we impound the vehicle.

MR. SELWOCKI: Your Honor, if I may approach and grab those documents that were provided to the Court, I think I just need two.

BY MR. SELWOCKI:
Q If you could look at what's been marked and entered by stipulation as Exhibit 2, look at that and tell us what that is.
A That's our general order guiding vehicle impoundments and towing.
Q Are you familiar with that order?
A Yes.
Q Was it pursuant to this order that you--
A Yes.
Q-- inventoried the car or were going to impound the car?
A Yes.
Q If I could direct your attention to the subsection marked V-B--

MR. PITTS: Excuse me. Could I see what you're

alluding to, Mr. Selwocki?

MR. SELWOCKI: Yes; absolutely, Mr. Pitts. The applicable--stipulated applicable general order, Section B, and I'm going to have him read part B into the record.

MR. PITTS: What was the previous question?

MR. SELWOCKI: Were these the impound guidelines at that time of the department.

MR. PITTS: Joint Exhibit?

MR. SELWOCKI: Two.

BY MR. SELWOCKI:

Q If you could read V-B into the record?

A When a driver is taken into police custody and all arrangements cannot be made by the arrestee to properly remove and/or secure the vehicle, it shall be impounded. In parentheses, City Vehicle Code Section 2.5(H).

Q Now, these are the guidelines you followed, correct?

A Yes.

Q Where was this car stopped at?

A In a parking lot of a small strip mall on the southwest corner of Thirteen Mile and Orchard Lake Road.

Q Pursuant to these guidelines, does that have any effect?

A No.

Q No, that doesn't talk to suspensions as you just talked before. Was there something else that you guys used that talked to a person who was driving while license suspended?

A Yes. There is an order in the police department that if a person--if a driver is stopped and we find that their driver's license is suspended and they're in violation of driving on a suspended license, the vehicle that they're driving is registered to them, that their vehicle is impounded.

Q Now, did you conduct a search at that point?

A Yes.

Q Did you conduct it in regards to the policies and procedures of the Farmington Hills Police Department, People's Exhibit No. 2?

A Yes.

Q Now, was he alone or with somebody else?
A Alone.
Q I know that--I think it's V-B states in there that if they can't--the arrestee can't take care of the car--is that correct?
A It says when arrangements cannot be made by the arrestee to properly remove or secure the vehicle.
Q Now, what do you mean by that? What does that mean? That's kind of vague. Explain to us what that means.
A We don't leave vehicles, whether locked or unlocked, on the side of the road or in parking lots.

MR. PITTS: Excuse me, Judge. In all due respect, I'm not too sure that that particular answer is responsive to the particular question; therefore, it's an impromptu remark that's not called for and I would ask that it be struck.

THE COURT: The objection is that it's not responsive.

MR. SELWOCKI: I feel that once he finishes his answer it probably will be responsive.

THE COURT: Why don't you just ask another question and we can obviate the objection.

MR. SELWOCKI: Thank you, Your Honor.

BY MR. SELWOCKI:
Q What is meant by the part that you just read in Subsection V-B regarding the arrestee having other means to take care of that vehicle? Not why it is there, but what is meant, if you understand my question.
A I don't. Please say it again.
Q Let's go over that, because that's very important. In V-B it says, "When a driver is taken into custody and arrangements cannot be made by the arrestee", what type of arrangements are we talking about?
A Turning the vehicle over to another person.
Q Is that exactly what this section means?

MR. PITTS: I'd have to object. What we are concerned about, Judge, is indeed--and what's coming out is what this officer's construction and indeed interpretation of that particular statement is, and if

the assistant prosecutor feels that it is important it may very well be, but the importance is restricted solely to what is construed as its meaning from this particular witness. He cannot explain indeed what that particular document and statement means in general.

THE COURT: What this officer--

MR. PITTS: That's correct.

THE COURT: I think he's saying it's leading, because it was.

MR. SELWOCKI: I'm just trying to get through this evidentiary hearing, Your Honor, as fast as I possibly can. I think what it was was argument prior to the finishing of the--

THE COURT: All right.

BY MR. SELWOCKI:

Q Anyway, so was there anybody else with him?

A No.

Q Was there anybody else to turn this car over to?

A No.

Q According to those procedures, would you call anybody else or have him call anybody else at that time?

A No.

Q Okay. So according to those procedures, you impounded the car?

A Correct.

Q All right. Do you have to fill out any paperwork pursuant to those procedures?

A Yes.

Q Did you do so in this case?

A Yes.

MR. SELWOCKI: If I can have this marked?

(People's Proposed Exhibit 3 marked)

THE COURT: Are you going to let me go to this meeting?

MR. SELWOCKI: I would never stop you, Judge.

THE COURT: We need a record.

MR. SELWOCKI: I'm almost done. I don't think the Court is much interested in what he found at this point.

THE COURT: We'll have to keep people here until

after lunch.

BY MR. SELWOCKI:

Q Showing you what's been marked as People's Exhibit 3, can you tell me what that's a copy of?

A A Farmington Hills Police Department Impound Vehicle Report.

Q Is that regarding this matter we're talking about right now?

A Yes, it is.

Q And did you complete that in conformance with the general order regarding inventory searches?

A Yes, I did.

Q Now, you talked earlier about also taking cars into--

impounding cars if a person was suspended?

A Correct.

Q And that is pursuant to training bulletins?

A That's correct.

Q Do you know the number off the top of your head?

A I do not.

Q If I showed you, would you recognize it?

A Yes.

MR. SELWOCKI: I'd move for admission of People's Exhibit 3.

MR. PITTS: We have no objections, Judge.

THE COURT: It will be admitted.

(People's Exhibit 3 received)

BY MR. SELWOCKI:

Q You don't recognize this right off, you'd have to read through it, correct?

A I would.

Q So basically, what you were going on at that point was just your knowledge of police procedure?

A Absolutely.

Q But not the actual document itself?

A Yes, sir.

Q But you did follow the procedures and guidelines as established in those inventory rules that were presented to the Court?

MR. PITTS: Judge, could we have some non-leading questions as to what he did and what his observations were?

BY MR. SELWOCKI:

Q Did you inventory the car?

A Yes.

Q You filled out the paper that was People's Exhibit 3?

A Yes.

Q What happened after that?

A The tow truck arrived and hooked up the vehicle and drove away with it.

Q And where was the car stored at?

A Hadley's Towing Company.

Q Is that pursuant to procedure as well?

A Yes.

MR. SELWOCKI: Nothing further, Your Honor.

THE COURT: Would you bear with me, and we'll do this after lunch so that my colleagues will not get angry with me.

MR. PITTS: Well, I don't know about the anger of the colleagues, Judge, but since you have spoken, even though it was in the form of a request, you wear the robe.

THE COURT: Okay. We'll complete it after lunch.

MR. SELWOCKI: Thank you, Your Honor.

(Lunch recess taken about 12:05 p.m.)

* * *

(Proceedings reconvened about 1:50 p.m.)

THE COURT: Officer, would you retake the stand?

MR. SELWOCKI: Your Honor, just one last thing I would say before I turn over the witness to Mr. Pitts is that we didn't cover what exactly was inventoried. That's the reason for this hearing which I believe is a suppression motion.

THE COURT: I don't think that's what the issue is, is it?

MR. PITTS: It's not. I'm not concerned about it.

MR. SELWOCKI: It was just two handguns. I mean, I

think the Court needs to know what it's anticipating or what the motion is to suppress.

MR. PITTS: I have no problem.

MR. SELWOCKI: Although we've argued that before, I just wanted to make sure that was on the record.

THE COURT: Sorry to take everyone's time this afternoon. The meeting went longer and louder than we had anticipated.

MR. SELWOCKI: I thought when judges got together everything was just calm and you guys had tea.

THE COURT: Oh, it was one of those where I didn't want to go, and shouldn't have. Sorry, sir.

MR. PITTS: I notice you didn't call for me.

THE COURT: I should have. You could represent my interest.

MR. PITTS: Thank you very much, Your Honor. With that, may it please the Court:

CROSS EXAMINATION

BY MR. PITTS:

Q Sir, prior to our recess for lunch you were being asked a series of questions by the representative of the government mainly with reference to your activities on the particular night in question involving Mr. Montgomery, is that correct?

A Yes, sir.

Q And among that series of questions were questions dealing with your stopping the vehicle, the basis of stopping the vehicle, correct?

A Yes, sir.

Q And the method that you used in approaching the vehicle, correct?

A Yes, sir.

Q With your partner, Officer Newcomb, correct?

A Yes, sir.

Q And then ultimately leaving the vehicle which had been stopped, going to your car and checking into the background of the driver, is that right?

A Yes, sir.

Q Incidentally, the car indeed in question was in a

parking lot for a commercial- what do you call it?

MR. SELWOCKI: I believe the word he used was strip mall.

BY MR. PITTS:

Q A strip mall, is that correct?

A Yes, sir.

Q With a number of owners for the various commercial transactions there?

A Yes, sir.

Q And your testimony further, if I'm not in error, is that after discovering that the Defendant's driver's license had been suspended, you approached the vehicle to arrest the driver, is that correct?

A Yes, sir.

Q And you were going to arrest the driver because he was driving on a suspended license, that is, Michigan license, isn't that correct?

A Correct.

Q So when the individual was approached by you and your partner, you ordered him--one of you ordered him out of the vehicle as you approached the vehicle, right?

A I would assume Officer Newcomb did, yes.

Q Well, you were right there, weren't you?

A Yes, but on the opposite side of the vehicle.

Q I understand. And there is nothing like a great chasm or anything dividing you and the other officer, right?

A Correct.

Q Just a matter of the width of the car. And there is nothing to stop you from hearing what is allegedly being said politely of asking the Defendant to step from the vehicle, right?

A Correct.

Q Did you hear any other words at that particular time that you recall?

A No, I don't.

Q And of course, if there was anything you would probably bring it to our attention, right?

A Yes.

Q But the bottom line is just to get him out of the car to

arrest him?

A That was my intention, yes.

Q Sure. And your fellow officer's intention as well, arrest this suspect because of the suspended license, correct?

A Right.

Q He's now been arrested after being ordered out of the vehicle, correct?

A Ah--

Q Excuse me, sir. Once he comes out of the vehicle, he's taken into custody, isn't he?

A He was after, yes. After he got out of the car, Officer Newcomb took into custody.

Q Taken into custody is the arrest, isn't it?

A Correct.

Q He's taken back to the scout car, the other scout car. You then began to search the vehicle, isn't that correct?

A Yes.

Q At that particular time, if I'm not mistaken--earlier this morning you were asked why did you search the vehicle, correct?

A Yes.

Q Okay. At that particular point, this afternoon when you were answering the question, you said well, it was during the course of a felony arrest or arrest of an individual, right?

A Right.

Q And you would want to impound the car, right?

A Right.

Q Fair statement to make that of the various documents that you've seen here there is nothing that justifies you impounding the car that's in indeed a private parking area, is there? Correct me if I'm in error. Anything that you've read here today--and if you can, show me--that authorizes you to impound a car that's in a private parking area?

A I believe the one impoundment order covers that.

Q Well, you just show me what you believe and if I can

approach you with whatever document it is.

MR. SELWOCKI: I believe it's Exhibit 2.

MR. PITTS: Is it Exhibit 2?

THE WITNESS: I believe so.

MR. PITTS: Judge, can I see Exhibit 2?

THE COURT: Certainly.

MR. PITTS: Could you give it to the witness, Judge?

BY MR. PITTS:

Q Now, you said something bears the number two. Would you refer to that?

A Well, it's Exhibit 2.

Q What in that particular order authorizes you to impound the vehicle?

A I believe under Section V-B.

Q Okay. What does Section V-B tell you?

A It says when a driver is taken into police custody and arrangements cannot be made--

Q Hold on. Let's not go too fast. When a driver is taken into custody, correct?

A Correct.

Q And you believe, correct me if I'm in error, that in order to accomplish things, if there are directions we have to do them in totality, not in part, correct?

A I would agree.

Q You would agree with that. But that has a premise--continue on. You said when the driver is taken into custody--

A And arrangements cannot be made by the arresting--

Q Excuse me. There is a compound there, it says "and". It's a conjunction, right?

A Right.

Q Arrangements what?

A Cannot be made.

Q Okay. Now, when you say arrangements cannot be made, that's part of this order, you tell this Court what efforts were made to contact people in order to indeed come pick up the car.

A Absolutely none.

Q So then indeed when you say absolutely none were made arrangement-wise, then that indeed has not been indeed implemented, has it?

A No.

Q So if indeed you agree with the premise that you mentioned earlier, that if you're going to follow directions, you do it in toto rather than dichotomize or break it apart, you haven't done that in toto here, have you?

A I'm sorry, will you say that again?

Q You remember we started off with the premise that if you follow orders or are taking directions, you try to comply with the complete order or request, isn't that correct?

A Correct.

A And you indicated that you didn't want to break them down to their parts, right?

A Correct.

Q Do you know what dichotomize means?

A Sure.

Q That's cutting something apart, right?

A Yes.

Q So then indeed when you testified here that there were no arrangements made or efforts made to get somebody to come and pick up the car, you have not completed the entire instructions, have you?

Yes or no, sir. Have you completed it?

A Not with your explanation, no.

Q But you're the one testifying that you were the officer on duty, doing the various things in compliance with the orders, isn't that right?

A Correct.

Q But that order, as you just testified to and that you have indicated that you did not make any arrangements to get somebody to come pick up the car, was something that you fulfill or lacked to fulfill, isn't that right?

A Right.

Q You're saying that your partner, in your presence, did not make any efforts to contact anyone who had some

familiarity with the Defendant and/or his vehicle?
A Correct.
Q Fair statement to make, you didn't offer the individual an opportunity to do something to have someone come pick up his car?
A Correct.
A Fair statement to make, that particular order indicates that arrangements--when arrangements are futile or haven't been made, right?
A I'm sorry, I couldn't hear you.
Q What are the words involved in arrangements?
A Arrangements cannot be made.
Q You can't jump to that conclusion about cannot be made until you're given an opportunity to be made, isn't that correct?
A Correct.
Q Fair statement to make that they were not given an opportunity to be made, were they?
A Correct.
Q Okay. You got the individual in the car and you've got to search the vehicle because it was incidental to the arrest supposedly, right?
A Yes.
Q Okay. Now, do you remember testifying at a preliminary examination sometime in this matter back in January of 1998?
A I do.
Q And you probably read that preliminary examination in preparation for your testimony here this afternoon, did you not?
A Briefly, yes.
Q Or within the last 24 hours you've read it?
A Yes.
Q I mean, that's common sense that you come in to testify and refresh your memory, right?
A Yes, sir.
Q Okay. You recall that when you were questioned during the course of that preliminary examination--I believe it's on page 20, Counsel--and I began questioning you on

cross-examination, probably on page 14, with the question:

"Officer Newcomb--

A I'm Nicholas.

Q Nicholas. you did not indicate anything in your direct testimony, did you, that indeed you were, indeed, going to search the vehicle incidental to an arrest and indeed for impounding, did you?

MR. SELWOCKI: Your Honor, I'd have to object. The question is too broad. The answers would be given pursuant to a question at the prior hearing that would be--if he's going to impeach him with something that he stated before, I guess we need to know what the question was that he stated before, not just anywhere in your testimony did you say that the moon had craters in it. Well, of course he didn't because he wasn't asked that. I mean, I don't understand--there's no foundation for the question, even though it's leading.

THE COURT: First can we get to where Officer Nicholas was testifying, because the pages that you gave me was Officer Newcomb.

MR. PITTS: First of all, let me go back if I may, sir, to the preliminary examination transcript and ask if you can identify this particular exam transcript, beginning with page 1, as being one that was held in front of Judge Walker or Small--

MR. SELWOCKI: Your Honor, I guess the question I have is--

THE COURT: Parker.

MR. PITTS: Parker.

MR. SELWOCKI: Judge Parker. Are we refreshing memories or are we--

MR. PITTS: I'm withdrawing the other question so that we can proceed.

BY MR. PITTS:

Q First of all, I want you to identify the preliminary examination transcript. Do you recall that and identify that as being a copy of same?

A Yes, sir.
Q Correct statement to make that it's on page 14 that indeed your testimony begins, is it not?
A I don't see--
MR. SELWOCKI: That would be incorrect.
MR. PITTS: Excuse me.
BY MR. PITTS:
Q Your testimony begins on page 15, does it not, sir?
A Yes, sir.
Q Okay, fine. And that is indeed the exam transcript that you reviewed in preparation for your testimony here today, is it not?
A Yes, sir.
Q You recall, do you not, that when you testified earlier, and I guess at least once, but just for purposes of having some continuity, when you approached the vehicle, you approached the vehicle to arrest the Defendant, right?
A I did not.
Q I beg your pardon?
A I approached the passenger side of the vehicle. Officer Newcomb approached the driver's side where the suspect was at.
Q But there was no question about it, you were there to assist in the arrest of the Defendant?
A Yes.
Q What did you do while the Defendant was being placed under arrest?
A I stood by as a cover safety officer.
Q Do you remember being asked that question:
"What did you do while the Defendant was being placed under arrest at the time of the preliminary examination?
A I believe I do.
Q And do you remember, then, that you gave your answer at that particular time, back in January, before you got into this matter regarding the seizure, the answer as follows:
"As Officer Newcomb placed him under

arrest, I stood by as a cover officer for safety. Once he was placed in the rear of the patrol vehicle, I began to search the vehicle, the Defendant's vehicle."

Were those your words and was that your answer?

A Yes, sir.

Q And the next series of questions dealt with what did your search reveal? Correct me if I'm in error.

A I believe so.

Q All right, fine. And you then proceed, correct me if I'm not mistaken, at the time of that exam to describe what you allegedly had found, isn't that right?

A I believe so, yes, sir.

Q And you initially found a gun underneath the driver's side or someplace around it, right?

A Yes.

Q That, correct me if I'm in error, led you to some indeed further action, didn't it?

A Yes.

Q That was to impound the vehicle, wasn't it? Yes or no.

A No.

Q That gun had nothing to do with your impounding the vehicle?

A No.

Q Okay, fine. Did you ask Mr. Montgomery about the ownership of that particular weapon?

A I don't believe I did.

Q Do you recall--on page 20, Counsel--that you were asked this following question at the time of the preliminary examination:

"After you found that weapon what, if anything, did you do next?

I addressed Mr. Montgomery about his possession of a CCW."

Does that sound familiar and was that your answer?

A Yes.

Q It was true then and it's true today, isn't it?

A Yes, sir.

Q And then the next question is, "What did he have to say

at that point in time," and the answer was, "He said that he had one but didn't have it with him." That is, a CCW permit, correct?

A Correct.

Q After that you were asked a series of questions--you were asked some questions.

What did you do after you had questioned him about that particular CCW permit, do you recall?

MR. SELWOCKI: I'm sorry, what's the question?

MR. PITTS: The question now is at this point in time.

BY MR. PITTS:

Q What did you do after you indeed had now conceded that that was the series of questions asked of Mr. Montgomery at that time? What did you do after asking him about the CCW permit?

A I believe I went back to the vehicle, walked back to his vehicle.

Q What did you walk back to the vehicle for?

A To complete the search and recover the weapon.

Q Okay. To complete the search of the vehicle?

A Yes.

Q You had already recovered one weapon?

A Yes.

Q Okay. Do you remember being asked a question at that particular time of the preliminary examination:

"After that" -- again, alluding to the discussion regarding the permit -- "did you do anything else with regard to searching that vehicle?"

Your answer being at that time:

"Yeah, I completed a search of the rest of the vehicle for the impoundment of it and found another weapon in the trunk."

Isn't that correct?

A Yes.

Q Do you remember I asked you a little question or two earlier about if the gun had anything to do, that is,

the recovery of the first gun, with the impounding concept of the vehicle and you said no, isn't that right?

A That's correct.

Q But indeed your answer here at the time in March of 1998 when the exam was held:

"After that, did you do anything with regard to searching the vehicle?"

"Yeah, I completed a search of the rest of the vehicle for the impoundment."

Those were your words, weren't they?

A Yes, sir.

Q So you're completing a search for what, the impoundment.

A For the impoundment.

Q So it did have something to do with indeed your searching the vehicle, didn't it?

MR. SELWOCKI: I don't understand at all, Your Honor.

MR. PITTS: What is it that you don't understand?

MR. SELWOCKI: Your point.

MR. PITTS: First of all, you've got to have a legal objection. What's the legal objection?

MR. SELWOCKI: I guess it's cumulative, it's asked and answered, it's not relevant, it's improper impeachment, it's embellishment.

THE COURT: Actually, it's compound so if you could step back for me so that I can follow it, then I would appreciate it.

BY MR. PITTS:

Q First of all, you were asked within the last five minutes whether or not indeed the seizure of the weapon, the first weapon that was found underneath the driver's seat, had anything to do with the impounding feature of your actions, right?

A Correct.

Q And you said no, isn't that correct?

A Correct.

Q And then I've asked you this question that was asked at the time of your preliminary examination, "After that,

did you do anything else with regard to searching that vehicle?" At the time of the preliminary examination you answer was, "Yeah--

MR. SELWOCKI: Your Honor--

MR. PITTS: Let me finish the answer.

MR. SELWOCKI: Well, let me object.

MR. PITTS: That's not the way you do that. Counsel, as a courtesy--

THE COURT: Let him finish the question.

MR. SELWOCKI: Okay. This question is improper.

That's not proper impeachment.

THE COURT: Let him finish the question.

MR. PITTS: And the answer is, "Yeah, I completed a search of the rest of the vehicle for the impoundment of it and found another weapon in the trunk." Were those your words at that particular time?

MR. SELWOCKI: Now here's my objection. First of all, I guess at an evidentiary hearing it doesn't matter that much, we're not in front of a jury, but you don't start reading from a transcript unless you have a reason to do it. There is no impeachment going on here that I can understand. He's not refreshing his memory. He's just reading from a transcript and then asking him questions about it. I don't see what the purpose to do that is. I don't see where it's relevant and I think it's improper impeachment, and I don't see any impeachment here.

MR. PITTS: Well, let me start over with the last statement, then, if he doesn't see any impeachment. It may very well be that he's blinded by it, and there's the forest and the trees.

The question that led up to the impeaching question was didn't you testify within the last five minutes about the vehicle's impoundment, that is, the search of the vehicle or the finding of the weapon, having nothing to do with indeed the impoundment of the vehicle. He's testified that it had nothing to do with it. This question and the answer seems to indicate that yeah, I

completed a search of the rest of the vehicle for the impoundment of it and found another weapon which means obviously that indeed it's the weapon that had something to do with the impoundment. That's my contention.

THE COURT: Well, it could very well be an impeachment. I'd like to hear his answer.

THE WITNESS: Could you ask me one more time?

MR. PITTS: Sure.

MR. SELWOCKI: I don't even know what the question is now.

BY MR. PITTS:

Q Again, we're dealing with--not impeachment for you, but for us--the reason for your indeed searching the vehicle. Do you understand?

A Yes, I do, sir.

Q Now you testified earlier today that you searched the vehicle because it was taking place at the time of an arrest, right?

A Yes, sir.

Q And an impoundment. That's what you said, isn't it?

A Yes, sir.

Q Searching the vehicle for impoundment purposes and indeed because of a--it was taking place during the course of an arrest, incident to an arrest, right?

A Yes, sir.

Q And that's what you're telling us today, June 29th--today is the 29th, right--

A The 30th.

Q-- of 1998. But back in March of 1998, at the time of the preliminary examination, you're telling us, correct me if I'm in error, "Yeah, I completed a search of the rest of the vehicle." That is, the rest of the vehicle, isn't that right?

A Yes, sir.

Q That means that you had searched earlier, hadn't you?

A Yes, sir.

Q And that search earlier revealed a gun, didn't it?

A Yes, sir.

Q And indeed, remember you indicated that after finding the gun you went back and talked to Mr. Montgomery?
A Yes, sir.
Q Remember, you talked about a permit?
A Yes, sir.
Q Then what did you do--after you were talking to Mr. Montgomery you went back to the car to continue the search, right?
A Yes, sir.
Q For the impoundment of it and found another weapon in the trunk, didn't you?
A Yes, sir.

MR. PITTS: That's the impeachment.

MR. SELWOCKI: I'll save it for the argument, Your Honor. I withdraw my objection.

MR. PITTS: See, he can't search for--he can't impound the vehicle before he even searches.

MR. SELWOCKI: I guess for the sake of argument he feels he has impeached him. You are now the one deciding this case. I don't--

THE COURT: You've withdrawn your objection?

MR. SELWOCKI: Yes.

THE COURT: He's withdrawn his objection.

BY MR. PITTS:
Q So now you have two weapons, do you not, one that you found underneath the seat and the other, a Glock or something, that you found in the trunk, right?
A Yes, sir.
Q And you then call in some agency, do you not, to come pick up the vehicle?
A Yes, sir.
Q How did you do that?
A I radioed to my dispatcher.
Q Is it possible that you can radio to your dispatcher and say we have Mr. Montgomery here who wants to telephone his sister to come pick up his vehicle? Was it possible to do that? Yes or no?
A Yes, it would be possible.

Q Okay. So you didn't extend to Mr. Montgomery the same courtesy that you would extend to some commercial business to have them come engage in some business transaction, did you?
A I don't understand your question.
Q You remember you indicated that it was possible for you to use the dispatcher to contact Mr. Montgomery's sister or his mother or his brother, anybody that Mr. Montgomery chose if indeed they were available, correct?
A Yes.
Q You didn't choose to do that, did you?
A I--I--
Q Did you do that?
A I did not do that.
Q That's an election that you made, isn't it?
A No.
Q I mean, you did something arbitrary without even thinking about it?
A I'm ordered to do that.
Q Okay. Was somebody there giving you an order?
A No.
Q So when you're talking about orders, you aren't talking anything that was dictated to you, you're talking about indeed your conscious perception of what you were entitled to do, were required to do?
A Yes, sir.
Q Well, didn't it indicate in that particular order that indeed arrangements are to be made if at all possible?
A That's what that said.
Q But you didn't make any arrangements, did you?
A No.
Q You sort of flubbed it at that particular point, didn't you, or you didn't fulfill that?
A No, sir.
Q You didn't act on it, did you?
A I acted in accordance with what I feel the police department policies are.
Q You acted just like the true police officer that you were to confiscate the man's vehicle, didn't you?

A Yes.
Q Without giving him an opportunity to have his due process rights indeed implemented, did you?
A I give no one.
MR. PITTS: I have no further questions.
With that, Judge, we have no additional questions. Thank you.
MR. SELWOCKI: Very briefly, Your Honor?
REDIRECT EXAMINATION
BY MR. SELWOCKI:
Q Earlier on Mr. Pitts, in the beginning of his cross examination, asked if you had heard all of the conversation or conversation at any point between Officer Newcomb and the Defendant. Now, did you ever hear Officer Newcomb ask him anything regarding if he had any weapons?
A I did not.
Q Okay. Does that mean you didn't hear it or it didn't happen?
A I did not hear it.
Q Mr. Pitts asked you a lot of questions regarding the procedures that you testified to on direct examination that you follow regarding the impounding of the vehicle, or the decision to impound the vehicle, correct?
A Yes.
Q And the one that we've talked a lot about, "When a driver is taken into police custody and arrangements cannot be made by the arresting agent to properly remove and/or secure the vehicle, it shall be impounded." Do you believe you followed this?
A Yes.
Q However, Mr. Pitts said what arrangements did you make and you said none. Why is that?
A There was no other person in the vehicle to give the vehicle to, to secure that vehicle.
Q Is that your understanding of what arrangements mean as far as police procedures go?
A Yes, sir.

Q Is this based on your experience as a police officer in Farmington Hills?
A Yes, sir.
Q Is this based on your training as a police officer in Farmington Hills?
A Yes, sir.
Q Is this based on everything you've heard from other police officers?

MR. PITTS: Well, let him testify now, Counsel. Judge, I just object to the series of leading questions. I thought he would stop.

MR. SELWOCKI: It's redirect, Your Honor, based on information he asked.

MR. PITTS: I don't have any problem, but the rules still apply.

BY MR. SELWOCKI:
Q Okay. Without me leading you, what is that based on?
A That's the way every police officer in my police department does that.

MR. PITTS: Objection. He can't testify about other police officers, only his personal knowledge.

MR. SELWOCKI: I believe he can, Your Honor, pursuant to the exact reason we're having this evidentiary hearing. The exact law on that is what are the policies and procedures of that police department which is the case law, and he would have to know those to testify. There is case law that says that written documents don't even need to be introduced for this hearing.

THE COURT: His response is that's what they all do as opposed to that's what we're all instructed to do.

BY MR. SELWOCKI:
Q Are you instructed to do that?
A Yes, sir.
Q Thank you.

Was there anybody else with him at that time?
A No.
Q And in your experience as a police officer, have you ever done what Mr. Pitts suggested and called in on your

dispatch radio to find out if somebody could come pick up this arrested guy's car?

A No.

Q If you did that, what would you have to do with the car while you were waiting?

A I'd have to sit there and babysit the vehicle until somebody from, you know, who knows where came to get the vehicle.

Q If they came?

A If they came.

Q And why would you have to do that?

A Because we're responsible for that vehicle, that is, the police department. If somebody breaks into that vehicle and steals the radio, we're going to be responsible because we removed the owner or the driver from that vehicle.

Q Even if the person was properly arrested?

A Yes.

Q Have you ever heard of anybody doing this calling somebody in or sitting by the car?

A I have not.

MR. SELWOCKI: Nothing further.

MR. PITTS: Just briefly, Judge.

RECROSS EXAMINATION

BY MR. PITTS:

Q Sir, you indicated that indeed you just observed that there was no one else available, no one sitting in the car, right?

A Right.

Q And consequently, you didn't feel that it was necessary to go anywhere beyond that, is that right?

A Yes, sir.

Q You felt that indeed you had fulfilled your particular duty and/or function just by--by forfeiture, I guess, because there was nothing there for you to do?

A Correct.

Q Now you mentioned something else, that indeed had you indeed contacted other people it would have required you

to babysit, is that right?
A Yes, sir.
Q And simply because you--let me digress. Because you haven't done it before, does that make it right?
A No, sir.
Q I mean, obviously you were aware--you've got an education, haven't you?
A Yes, sir.
Q That indeed there are times when you have discovered that you might have been doing things the wrong way that you tried to correct, isn't that correct?
A That's correct, sir.
Q And that doesn't make what you've done wrong right, does it?
A No, sir.
Q And simply because you may be doing--following a policy that you construed to be correct doesn't necessarily mean that it's right, does it?
A No, sir.
Q Returning again to the babysitting aspect of this, you indicated that indeed the phone call might have necessitated someone else coming out while you were waiting or something to that effect?
A They could, yes, sir.
Q Is there something wrong with waiting for a citizen to exercise his rights or her rights? Is there something wrong with that?
A No, sir.
Q You wouldn't have been violating any rule or regulation, would you?
A To not impound his vehicle, yes.
Q No, no, I didn't say about impounding. I'm just talking about waiting.
A Oh, just waiting.
Q Yes. You wouldn't have violated any constitutional law that you know of or any written regulation that you know about?
A No, sir.
Q It would have been indeed fulfillment and indeed have

entitled a citizen to implement that particular right that he has and privilege, isn't that right?

A Yes, sir.

Q Even if it caused you to wait, correct? You're being paid, aren't you?

A Yes, sir.

Q Whether indeed you're driving or indeed waiting?

A Yes, sir.

Q Or whatever waiting you want to apply to it, babysitting or indeed house watching, the fact of the matter is that it's the right of a citizen that you're there to protect, isn't that right?

A Yes, sir.

Q Whether or not you're stopping somebody for a violation, they still have rights, don't they?

A Absolutely.

Q And you want to afford them that benefit, don't you?

A Yes, sir.

Q Even though it may be babysitting rights, right?

A Yes, sir.

Q The fact of the matter is you didn't give him an opportunity to indeed make those phone calls, did you?

A No, I did not.

Q Just took his car away from him. Well, you didn't do that, you just felt you were following the rules. You've never been South, have you?

A I'm sorry?

MR. SELWOCKI: I object to relevancy, Your Honor.

BY MR. PITTS:

Q They do things like that in the South. Have you ever heard of that?

A I have quite a few friends from the South that would object to that.

Q I have no friends in the South. They do things like that in the South.

MR. SELWOCKI: I find that entire argument completely and totally objectionable, and improper.

MR. PITTS: I have no other questions.

THE COURT: You may step down, sir.

(Witness excused about 2:45 p.m.)

THE COURT: Your next witness?

MR. SELWOCKI: Your Honor, depending on Mr. Pitts' pleasure, I don't think there is a need to call, because he's not contesting the stop or the arrest, the other officer, Newcomb. I think we've satisfied our burden.

MR. PITTS: I have no problem with that, Judge, and I move to have the transcript of the preliminary examination introduced as evidence.

MR. SELWOCKI: No objection.

MR. PITTS: And with that, we have no additional witnesses to call.

THE COURT: Well, I guess you're going to argue again.

MR. SELWOCKI: I'll be very brief, Your Honor.

The first thing I'll say, Your Honor, is I believe the Court wanted the hearing basically just on the inventory search. We're talked about the other issues before, Court has heard our arguments on those, read our briefs on them, and I would just incorporate them as part of this record pending whatever decision the Court may make.

The law regarding inventory searches is pretty clear in the State of Michigan from People v Toohey, 438 Mich 265 (1991). There is also a case, People v Krezen, that's K-r-e-z-e-n, 427 Mich 681. I believe that's 1986, I might be wrong, it might be 1987. That basically says that the police officers follow their departmental procedures and they can impound the car and do an inventory search pursuant to such impoundment.

Now based on the arguments that have been made so far and based on cross-examination by Mr. Pitts of the witness, the concern that the defense has in this case is the actual impounding of the car, not the procedures that were followed afterwards, although we did introduce as Exhibit 3 the paperwork that they use when they do that.

THE COURT: The concern is that he wasn't given an

opportunity to make other arrangements.

MR. SELWOCKI: Well, there's two things, Your Honor. One, there is testimony from the officer, regardless of those written procedures that state that when a driver is driving while on a suspended license, there is a procedure that their police department, based on some rules we did introduce into evidence, I think they were called Police Bulletins, that they could do this impounding regardless of these rules, and that was his testimony. And I look at People v Krezen because that's a Michigan Supreme Court case--

THE COURT: What is it that you introduced where it says that?

MR. SELWOCKI: We didn't introduce the written document, it was the testimony of the officer regarding the suspensions. I've handled that as a side and then I'll--

THE COURT: You said based upon what we introduced. Did you introduce the additional procedures?

MR. SELWOCKI: No, I didn't. What I did was ask the question of the officer. I apologize if I misstated myself, Your Honor.

THE COURT: Go ahead.

MR. SELWOCKI: Based on the testimony of the officer, regardless of these introduced procedures which are stipulated Exhibit 2, there are procedures regarding if somebody is driving while license suspended, which is exactly what we have in this case, and if that car is then impounded, and that was procedures of the police department. That was the testimony that the Court had regarding that issue alone.

And I'd just ask the Court to look at People v Krezen where they did a case all the way up to the Michigan Supreme Court regarding the procedures of the police department and did not require that any written documentation ever be introduced, so that by itself satisfies our burden.

But looking at the issue that Mr. Pitts has made on what we did introduce, I will address that as well. The

statement is real clear, "if other arrangements can't be made". All the cases dealing with inventory searches--Toohey and Krezen, and there's other ones as well, People v Poole, 199 Mich App 261 (1993)--all deal with a police officer's discretion regarding the impoundment, then inventory under the rules because we're talking about something administrative now and not a criminal investigation.

And the reason that it is, is for the reasons the officer stated on the record, just like in those cases the officer would state on the record, that you have a concern that once that person is arrested--Mr. Pitts talked a lot about a citizen this, that and the other. Even though they are arrested they are still a citizen, but they are arrested and there is a valid arrest and they are taken from that spot.

So we don't have anybody just arbitrarily having their car impounded, we have a person validly arrested and removed so the car is just sitting there. I think every department that I've ever heard of has procedures, written or not, that deal with that issue because they get sued by the very people that they arrest if something happens to that car or if it's damaged, broken into, or whatever.

Now the concern is what do you do about these cars. Well, other arrangements have to be made. We hear a lot about this in drunk driving cases. The passenger is sober, somebody in the back seat is sober so they take the car. The person is arrested on an outstanding warrant after they ran the stop sign. The other person has a valid license, other arrangements are made. If the defendant consents, the car is taken by that person.

Here you have somebody by themself that is just going to park the car up on a strip mall for whoever knows how long unless they sit with it, hoping while the person being validly arrested--they call on their radios back to the station to see if they can find somebody, they have to sit there, they have to use the phone to call for that, it gets out of control. And as Mr. Pitts

said, their basic duty is to protect citizens, to defend citizens, to be police officers of citizens, and that is a colossal waste of time because we're talking about somebody who is validly arrested. We are taking that officer in that situation away from every other citizen out there after a valid arrest has been made if we're going to follow that procedure. And as far as I know, there is no procedure that requires that--up North or down South.

I believe we have satisfied our burden as far as a proper inventory search. And as I say, we would incorporate our arguments from the prior motion dates.

Thank you, Your Honor.

MR. PITTS: May it please the Court, let me begin by--as I say, I'm not too sure that we heard the same testimony here, that is, Mr. Selwocki and myself in light of indeed our reactions to what has been said and the arguments anticipated and certainly given by Mr. Selwocki.

It would seem to me, first of all, what we are concerned about in a court of law, wherever we may be, South or North, is affording the individual, suspect or defendant, all of his inalienable rights that I think that this country allegedly was founded upon. If that's so, we then can't do it bit by bit or part by part and withhold others. It would seem to me what we are concerned about is giving a person his due process rights completely.

Having said that, let me suggest that what we are concerned about in this particular--at this juncture is indeed whether the police department had the right to impound the vehicle and, if so, what procedure did they follow in impoundment. And as indicated by the series of cases that the assistant prosecutor has alluded to, those cases only deal with indeed the impounding procedure. I don't think it's fair to come in and try to snowball the judge with I've got this case and that case without indeed citing the particular language as it applies to the facts that we have in this case. We

haven't heard anything about that, and you will not hear anything about it because it doesn't deal with this particular subject that we are concerned about here. Whether or not they had the right to impound the vehicle and how did they impound the vehicle may be some of the things that are related to the Toohey case.

But the bottom line is that there is a written procedure for the impoundment of vehicles. You have that. You have one of the dates for 1997, I think it's combined Exhibit 2, and we have another which is combined Exhibit 1 that deals with 1998. So we're concerned about indeed the written procedure, which the courts are now concerned about because they're asking what is the procedure. So they reduce to writing in these communities a procedure so that indeed it is a procedure that is standardized and followed by the employees. I mean, why have it?

In this particular procedure for 1997 it says listen, when the person is arrested, supposedly, for what that particular circumstance may be in that regulation indeed arrangements can be made or should be made. I don't think that those particular words are there, should be or will be, et cetera, but it uses the word "arrangements", and I think any superior court as well as trial court is entitled to interpret what arrangements may mean and the logical inferences that you can draw from that particular word. The word is harmless, meaningless and indeed it's a nullity if you don't give it some meaning.

And you have to--indeed, if you give it meaning, you have to also give it an opportunity to be exercised. What arrangements are they talking about? Arrangements for the individual to indeed secure his own vehicle or to have somebody else come up and secure it. They're meaningless unless implemented or given an opportunity to have them implemented. He was not afforded that particular right, as stated by this officer. He didn't live up to fulfilling the particular rules and regulations. He just acted upon them in part. That's

not fair. It doesn't afford the individual his rights or protection of the law and that's why those rules were written there.

The prosecutor talks about well, the officer didn't testify in his own words, there are also bulletins, et cetera, that authorize us to take the car into impoundment, et cetera, under these circumstances. Where is it in writing? You know, we spent a whole day here waiting for these documents to come in here in writing and don't you think if there was anything to support what this officer was talking about we would have it in writing? I mean, that's ridiculous and also absurd, and I think it's unfair to have somebody try to provide us with some testimony as a catch-all and say we had this other authority. Well, where is it? Show it to me. They don't have it, and it's not going to be in existence, because what they have done is to form this particular standard or procedure as supposedly documented by alleged Exhibits 1 and 2.

Returning again to supposedly the--something used by the assistant prosecutor about some discretion and some rules, the fact of the matter is that indeed these particular rules are the governing authority by which the officers act. I don't think there is any discretion there. I think they have to comply with those rules, otherwise they're negligent and derelict in the performance of their duties. Duties are not something that you can pick and choose what you're supposedly going to employ. You have to employ or follow them all. I don't think it's fair for us to say that indeed we can pick out this and we can pick out that. I just don't think that it's necessary.

And finally, if we do do the other, make the allowances, it just takes up a lot of time. Well, la-de-da. It takes up a lot of time. Well, no one told you when you became a police officer you wouldn't be indeed taking up a lot of time just doing some things that other people may think are meaningless and useless.

The fact of the matter remains that you're on duty patrol for eight hours. Indeed, you're expected to comply with the rules and regulations as well as the ordinances that control our communities as well as the state laws.

I am suggesting in this particular instance, Judge, and this particular case of Mr. Montgomery, number one, his vehicle was not properly impounded, not rightfully impounded. There are no rules or authority in the particular documents we have as exhibits governing the supposed conduct of these officers under these circumstances that supposedly enabled the officer to impound this car at that particular time. If there is, then it's done with indeed an allowance of the implementation of this man having indeed this opportunity to have people come in or to some way make some arrangements for his car. Since they were not complying with, I am suggesting to this Honorable Court that the indeed impounding of the vehicle as well as the search of the vehicle, again, was illegal and that this case should be dismissed because of the illegal obtaining of the evidence.

Thank you.

MR. SELWOCKI: Just very briefly in rebuttal, Your Honor.

The first thing I'd like to say, as this Court knows, this attorney has been before this Court for a while now. I would never attempt to snowball this Court nor would I ever attempt to snowball Mr. Pitts or any other attorney in a criminal prosecution. I try to speak as I know the law to be, or at least the way I believe it's to be interpreted, and then the Court decides if I'm right or I'm wrong.

There is language in People v Krezen that states that language in--that's the case where they didn't even introduce the actual written documents, but there is language in there that says that it's not overbroad, that language that is overbroad is not per se improper language. Mr. Pitts has said what he would like

arrangements to mean, but it doesn't say anywhere in that document that you have to call or do these other things he states, so I agree with what Mr. Pitts says about the logical inferences and what that means when we're dealing with situations on the road.

Thank you, Your Honor.

THE COURT: Well, I think I'd better go take a look at some of those cases that you've cited so let me issue a written opinion, and I'll do that within the next ten days.

MR. SELWOCKI: Let me ask you this, Your Honor, just because I have one quick question regarding that written opinion.

THE COURT: I guess it won't go to trial.

MR. SELWOCKI: That was the question. But if the Court--is the Court going to rule on the Belton issue and the other issues as well?

THE COURT: I already did. Do you want another opinion?

MR. SELWOCKI: No. If I'm incorrect, I believe the Court said you were going to hold that in abeyance and hear the inventory hearing.

MR. PITTS: I think what the Court was doing at that particular time was reserving its overall ruling on the seizure, based upon whether or not--

THE COURT: Yes, because if it was inventory we didn't have to address it.

MR. PITTS: And the second thing is that I've brought up during the course of that argument that there was a case in the Supreme Court, U.S., that supposedly dealt with exactly what we're talking about, the depth of the search after the stopping of the vehicle. It didn't come down, I don't think; at least, I haven't seen it. But I'm going to talk to that now Federal judge who brought to my attention that I was right and then I'll see if I can find that case.

THE COURT: All right. So anybody who wants to submit additional citations to me, would you do that?

MR. SELWOCKI: At this point, I'll just rely on what we've produced and what was stated on the record.

THE COURT: And Mr. Pitts, would you do that within the next week or so?

MR. SELWOCKI: Just so I can get a copy of it--

MR. PITTS: Sure, I will give it to you.

MR. SELWOCKI: Thank you.

THE COURT: All right.

(Proceedings concluded about 3:00 p.m.)

CERTIFICATE OF COURT REPORTER

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

I do hereby certify that the foregoing pages 1 through 72, inclusive, comprise a true and correct transcript of proceedings in the matter of People of the State of Michigan versus Dwight Montgomery, Case No.

98-157635-FH, held on Tuesday, June 30, 1998.

KAREN C. HOLLEN, CSR-0696

Official Court Reporter

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U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General Washington, D.C. 20035

July 6, 1998

The Honorable Spencer Abraham
United States Senator
26222 Telegraph Road, #200
Southfield, MI 48034

Dear Senator Abraham:

I am responding to your letter addressed to former Assistant Attorney General Andrew Fois, Office of Legislative Affairs, enclosing correspondence on behalf of your constituent, Mr. Duane Montgomery, who complains that law enforcement officials with the Farmington Hills Police Department have engaged in abuse of power, misconduct, harassment and discrimination as a result of a community policing policy, which unconstitutionally targets African American males. In particular, Mr. Montgomery contends that he was subjected to an unwarranted traffic stop, an illegal search and seizure of personal property, false arrest and that he was denied timely and appropriate medical care during his incarceration in the Farmington Hills Jail. In addition, Mr. Montgomery is seeking assistance with the appeal of his lawsuit.

The Civil Rights Division may address allegations of police misconduct through administrative reviews and civil litigation. Individual complaints of discriminatory law enforcement by a state or local agency that receives federal financial assistance may be investigated using administrative means (42 U.S.C. §§ 2000d, 3789d(c)). In addition, suit also may be filed where administrative efforts to voluntarily resolve a valid individual complaint of discrimination are unsuccessful (42 U.S.C. § 2000d).

Our review of Department of Justice records indicates that the Farmington Hills Police Department is a recipient of Justice Department financial assistance. Accordingly, the Civil Rights Division's Coordination and Review Section will write to Mr. Montgomery to explain the procedure he may follow to file an administrative complaint of police misconduct with the Division.

With respect to Mr. Montgomery's contentions that he was denied timely and appropriate medical care, the Department has the authority, pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997, to investigate public institutions, including local jails, when there is reasonable cause to believe there is a pattern of practice of conditions that deprive individuals of their constitutional or federal statutory rights. This authority, however, does not extend to investigating individual grievances. Finally, with respect to Mr. Montgomery's request for assistance with his pending appeal, we are not authorized to provide legal assistance to or intervene in ongoing private litigation. Regrettably, under these circumstances, we are unable to extend any legal assistance to Mr. Montgomery. We can only suggest that Mr. Montgomery may wish to contact the local Bar Association in Farmington Hills for a lawyer referral for assistance with his pending appeal.

In closing, we wish to thank you for bringing this matter to our attention and hope this information will be of assistance to you and your constituent.

Sincerely,
signed Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

(2)

FILED
NOV 4 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-468

In The

Supreme Court of the United States

October Term, 1998

DUANE MONTGOMERY,

Petitioner,

vs.

CITY OF FARMINGTON HILLS;
FARMINGTON HILLS POLICE DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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35 pp

QUESTIONS PRESENTED

I. Whether this Court should deny the petition because the appellate court properly granted a dismissal based on the lack of jurisdiction for the reason that the Petitioner did not appeal from the final order?

II. Whether this Court should deny the petition because the trial court properly granted the motion to set aside a default?

III. Whether this Court should deny the petition because the trial court properly concluded that summary judgment would be granted to that Defendant because the Farmington Hills Police Department is not an entity subject to suit?

IV. Whether this Court should deny the petition because the trial court properly concluded that no constitutional violation had occurred and the Petitioner's lawful arrest was based on probable cause?

V. Whether this Court should deny the petition because the issue of constitutionality was not raised below, and furthermore, the state abandonment statute is constitutional?

VI. Whether this Court should deny the petition because Petitioner's denial of medical treatment is also frivolous where videotapes and records show that Petitioner was taken to the hospital where he received medical treatment?

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OPINIONS BELOW

Respondent protests that this Court should consider the *final* Opinion and Order for the trial court dated August 11, 1998 because this Opinion and Order was never within the appellate court jurisdiction because at the time Petitioner filed the appeal relating to the Default, the final Opinion and Order had not yet been issued overturned.

JURISDICTIONAL GROUNDS

Respondents accept the jurisdictional statement as set forth in the Petition except to the extent that any conflict exists in this Court or in the decisions of the Circuit Court of Appeals. In fact, *all* circuit courts are consistent with the court rules requiring a final order *before* the jurisdiction of *any* appellate court can be invoked.

STANDARD OF REVIEW

> Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of informing the court of the basis for his or her motion. *See Celotex Corp. v. Catrett*, 447 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The movant must demonstrate either the absence of a genuine issue of fact of the absence of evidence supporting the nonmoving party's case. *See Id.* at 325, 106 S. Ct. at 2554. Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S. Ct. at 2552. The substantive law

identifies which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 91 L. Ed. 2d 202 (1986). "The district court is not to make credibility determinations or weigh the evidence" upon a motion for summary judgment. *Adams v. Metiva*, 31 F.3d 375, 384 (CA 6, 1994) (citing *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513).

When determining whether there is a genuine issue for trial, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962); accord *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). "Although [the nonmoving party] is entitled to a review of the evidence in the light most favorable to him or her, the nonmoving party is required to do more than simply show that there is some 'metaphysical doubt as to the material facts.' " *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (CA 6, 1994) (quoting *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356). Rule 56(e), "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that thee is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553 (quoting Rule 56(e)). "The mere existence of a scintilla of evidence in support of the Petitioner's position will be insufficient; there must be evidence on which the jury could reasonably find for the Petitioner." *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512. (RE 93, Opinion and Order dated 8/11/98, pp. 4-6).

STATEMENT OF THE FACTS AND PROCEEDINGS

A. Facts of the Underlying Matter.

The April 13, 1996, Incident

On Saturday, April 13, 1996, at approximately 2:30 p.m., Farmington Hills Police Officer Zimmer[1] observed the Petitioner driving on Farmington Road in the City of Farmington Hills at a higher than posted rate of speed. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh. 2, Zimmer's Police Report). The radar mounted in Zimmer's patrol vehicle clocked Petitioner's car traveling at a rate of 56 mph in the 40 mph zone. Officer Zimmer initiated a traffic stop to investigate the driver for speeding, which was videotaped and provided to the trial court in the Summary Judgment Motion (RE 52, Plaintiff's Motion for Summary Judgment).

Officer Zimmer approached the vehicle on its passenger-side and asked Petitioner, the lone occupant and driver of the car, to produce his driver's license and the vehicle's registration and insurance. Petitioner was immediately agitated and uncooperative. He produced his driver's license, but not the registration or insurance. Petitioner adamantly denied that he was speeding when Officer Zimmer told him the reason for the stop. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report)

During this roadside questioning, Officer Zimmer observed, in plain view, a large fanny pack buckled around the Petitioner's waist. Officer Zimmer recognized the pack as the sort used by police officers to carry their weapons while off-duty. Upon making this observation, Zimmer asked Petitioner if he had a gun. Although the police eventually recovered two fully loaded weapons and 21 rounds of ammunition from the Petitioner's person, he initially

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1. Officer Zimmer has, since April 13, 1996, married and her new name is Vaughan. However, she will be referred to throughout this brief as Officer Zimmer. (Exh 2).

refused to answer the question. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report).

Upon further roadside questioning, Petitioner admitted that he was armed and claimed to work for "the state", but refused to acknowledge whether he was a police officer. In Petitioner's Appendix page A-25, the investigating officer, Mr. Tigerman, learned that the State disavowed any knowledge of Petitioner, Detroit Edison refused to respond, and the "registered" owner of the vehicle could not be reached. Yet, Petitioner continued to argue with Zimmer about the propriety of the traffic stop and the validity of Zimmer's radar reading. Petitioner insinuated that the true reason that he was stopped was his race, as Petitioner is an African American. Fearing for her safety in dealing with the armed, agitated and uncooperative suspect, Officer Zimmer called for backup. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report). While waiting for her backup, Officer Zimmer asked the Petitioner several times to turn off his car. Petitioner ignored each order and continued to argue with Zimmer. Petitioner refused to say whether he possessed a concealed weapons permit, made a veiled reference to the notorious Rodney King case and threatened to file a complaint against Zimmer. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report).

Petitioner's request to speak with Zimmer's supervisor was fortuitously honored when Farmington Hills Police Sergeant Summers arrived, along with Farmington Hills Police Officer Woodmore, to serve as Zimmer's backup. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 4, Summers' Police Report). Sgt. Summers approached the idling vehicle and observed Petitioner in the driver's seat with one hand on the steering wheel and the other on the stick shift. Having been informed by Zimmer that Petitioner was armed, Summers asked if it was true. Petitioner's response was, "I'm not required to answer that question." Petitioner ignored Summers' order to shut off and/or exit the car and refused to tell Summers whether he was a police

officer. The situation escalated briefly as Petitioner violently refused several orders to get out of the car. During this brief and intense moment, Officer Zimmer was compelled to unholster her own gun and take aim at the Petitioner until Officer Woodmore and Sgt. Summers were able to remove the Petitioner from the vehicle and confiscate his weapons. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report). No shots were fired and Zimmer reholstered her weapon the moment the situation calmed.

During a subsequent patdown search, the officers recovered a fully loaded .50 caliber pistol, with a bullet in the chamber, from Petitioner's fanny pack. Two loaded magazines were also recovered from the pack. In a holster strapped to the Petitioner's ankle, the officers discovered a fully loaded 9 mm firearm, which also had a bullet in the chamber. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report, and Exh 4, Summer's Police Report).

Petitioner was arrested for Carrying a Concealed Weapon and Failing to Obey a Police Officer's Order. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report). He was ticketed for several traffic offenses as well. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 5, Ticket No. 294921). Additionally, the officers confirmed that Petitioner was wanted on a City of Lansing warrant for unpaid parking tickets. During an inventory search of the automobile, the officers located Petitioner's concealed weapons permit. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 6, CCW permit). The permit restricted Petitioner's privilege of carrying the concealed weapons to doing so only in the course of his business with his employer, Engineering Technology Research, Inc. (*Id.*)

The officers also discovered multiple employee identification cards purportedly certifying Petitioner as an employee of the DNR and Detroit Edison. (*Id.*) Petitioner refused to clarify the issue of his employment, or even to indicate whether he was working at the time of the traffic stop, as required by his CCW permit. RE

63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report, and Exh 4, Summer's Police Report). Sgt. Summers was unable to contact Engineering Technology Research by telephone, or locate the business at its purported business address in Livonia. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 4, Summer's Police Report)

Although the police were unable to confirm that Petitioner was compliant with his permit's restrictions at the time of the traffic stop, the Oakland County Prosecutor declined to authorize a criminal complaint for Carrying a Concealed Weapon. Nevertheless, a complaint and warrant were issued for Interference with Police Authority. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 7, Complaint and Warrant). Petitioner was found guilty of the charge following a May 18, 1997, jury trial and was sentenced to ten days in jail and $200.00 in fines and costs. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 8, Misdemeanor Register of Actions). Additionally, on July 25, 1996, after an informal hearing, Petitioner was found responsible for the traffic violations and ordered to pay $105.00 in fines and costs. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 5, Traffic Citation). This finding was affirmed in a September 26, 1996, formal hearing. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 9, Misdemeanor Register of Actions).

The November 20, 1997 Incident

A year and seven months later, at approximately 6:00 p.m. on Thursday, November 20, 1997, Farmington Hills Police Officers Newcomb and Nichols observed Petitioner's vehicle traveling southbound on Orchard Lake Road in the City of Farmington Hills. The vehicle's license plate was illegally displayed in the rear window, such that it was partially obscured by the third taillight. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report and Exh 11, Nichols' Police Report). Petitioner improperly asserts that he was stopped for having an *illegal* plate. (*See* Petitioner's Motion for Summary Judgment,

¶ 1). In reality, Petitioner was stopped for improper attachment of his plate, in violation of M.C.L. 257.255; M.S.A. 9.1955, which requires that the registration plate be "securely fastened" to the rear of the vehicle, "at a height of not less than 12 inches from the ground", and "free from foreign materials that obscure or partially obscure the registration information."

As the officers stopped the vehicle for the improperly displayed plate, they ran a check on what they believed to be the number on the obscured plate. The plate number which the officers ran was not registered with the Secretary of State. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report and Exh 11, Nichols' Police Report). Due to the obstructed view of the plate, the officers believed its number to be 3889FJ. In actuality, the plate, number 3889EJ, was properly registered and valid.

During this traffic stop, as with the April 13, 1996, traffic stop, Petitioner was insistent and uncooperative. He immediately demanded to know why he was stopped. Upon the officers' request, Petitioner produced the registration for the vehicle and an Ohio driver's license, listing his home address as 1064 N. Main Street, Bowling Green, Ohio. A check of the Law Enforcement Information Network (LEIN), showed that the Michigan Secretary of State had *suspended* Petitioner's Michigan driver's license *five* times, all of which were in effect on November 20, 1997, the day of his arrest. Petitioner claimed that, despite the suspension of his Michigan driver's license, he was entitled to drive in this state with his Ohio driver's license. Petitioner further told the officers that he was resident of the State of Ohio.[2] (RE 63 Defendant's

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2. According to the laws of the State of Ohio, Petitioner was ineligible for the Ohio's driver's license, both because his driving privileges were suspended in Michigan, and because he did not, in actuality, reside in Ohio. OH ST § 4507.06 and 4507.08. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing).

Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report and Exh. 11, Nichols' Police Report).

Notwithstanding, Petitioner was arrested for driving with a suspended Michigan driver's license and taken into custody. M.C.L. 257.904; M.S.A. 9.2604, provides:

> (1) *A person whose operator's or chauffeur's license* or registration certificate *has been suspended or revoked* and who has been notified as provided in section 212 of that suspension or revocation, who application for license has been denied, or who has never applied for a license, *shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles*, including an area designated for the parking of motor vehicles, within this state.

When asked if he had any weapons, Petitioner coyly responded, "Not on me". An inventory search of the vehicle revealed a semi-automatic handgun wrapped in a rag, located under the driver's seat. This weapon was fully loaded, with a round in the chamber. The officers also recovered from the vehicle three ammunition magazines, and a second loaded semi-automatic handgun. Petitioner claimed that he had a valid concealed weapons permit, but had left at home. Yet, M.C.L. 28.426(6); M.S.A. 750.229 requires a CCW "licensee [to] carry the license upon his or her person . . . when carrying the pistol . . . in a vehicle . . . The licensee shall display the license upon the request of a peace officer."

In actuality, Petitioner's concealed weapon license had been suspended on an interim basis by the Wayne County Concealed Weapons Licensing Board (Gun Board), after Petitioner failed to appear for an investigatory hearing in May of 1997. The May 1997 hearing had been scheduled in order to investigate the suspicious circumstances surrounding Petitioner's use of his concealed weapons permit at the time of his April 13, 1996, arrest.

Petitioner did appear for a hearing before the Concealed Weapons Licensing Board in November or December of 1997, following his November 20, 1997, arrest. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing). At that time, Petitioner claimed that he did not receive notice of the May 1997 Hearing because the post office refused to deliver mail to his home address, 1502 Harding, Detroit[3], until he rebuilt the front porch which was destroyed in an infamous 1997 tornado. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 1-12). However, a tornado which hit Detroit, Hamtramck and Highland Park on July 2, 1997, several weeks *after* the May 1997 Gun Board Hearing for which Petitioner declined to appear. Moreover, during the course of the November or December 1997 Hearing, Petitioner admitted that at the time of his November 20, 1997, traffic stop, his license plate was not properly displayed. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 26-27). Petitioner also admitted that he was not carrying his concealed weapons permit with him on November 20, 1997, as required by law. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons

3. At the gun board hearing which was held in November or December of 1997, Petitioner denied that he was an Ohio resident, contrary to his assertions at the time of the November 20, 1997 arrest. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report, Exh 11, Nichols' Police Report and Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 1-2, 8-9). Thus, his Ohio's driver's license was invalid. *See* note 4, *supra*. At this hearing, Petitioner also misrepresented the sequence of events surrounding the April 13, 1996, arrest, which were memorialized in the videotape attached hereto as Exh 3. *See also* RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 19-23.

Licensing Board Hearing, p. 10). As a result of the November or December 1997 Gun Board Hearing, Petitioner's concealed weapons permit was *permanently* revoked. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 29-30).

While en route to the Farmington Hills Police Station on November 20, 1997, Petitioner told Officer Newcomb that he was a diabetic and in need of his afternoon insulin. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report). When they arrived at the station, Petitioner was examined by paramedics and transported to Botsford Hospital for treatment of abdominal pain. (*Id.*; RE 63, Exh 13, Botsford Hospital aftercare instructions, RE 78, 79 Videotape). Petitioner was released from the hospital at approximately 8:30 p.m. and returned to the Farmington Hills Police Department where he was booked and lodged without apparent incident. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 13, Botsford Hospital aftercare instructions, and Exh 10, Newcomb's Police Report). Petitioner's Medical History Screening Questionnaire, completed at 9:20 p.m. on November 20, 1997, reflects his diabetic history and treatment and a complaint of wrist pain, but notes no visible injuries or an illness. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report).

At approximately 10:45 p.m., Petitioner complained to the police of coldness and numbing in his legs. He did not complain of increased abdominal pain, but requested a return visit to the hospital for an insulin shot. (RE Defendant's Counter-Motion for Summary Judgment, Exh 14, Burkhart's Police Report). Farmington Hills Police Sergeant Burkhart reviewed Petitioner's aftercare instructions and noted that they advised he return to the hospital only for increased abdominal pain. (RE Defendant's Counter-Motion for Summary Judgment, Exh 14, Burkhart's Police Report, and Exh 13, Botsford Hospital aftercare instructions). Petitioner then requested an extra blanket for his comfort,

indicating that he would be fine and expected to be released soon. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 14, Burkhart's Police Report).

Petitioner was released without bond, pending further investigation, at approximately 11:30 a.m. on November 21, 1997, after just 7½ hours in custody.[4] (RE 78-79, videotape; RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 3, Lt. Brown's Police Report; Exh 14, Burkhart's Police Report; and Exh 15, Arrest Record/Prisoner Tracking showing date and time of release). Despite Petitioner's present allegations of "hyperglycemic pain" and "diabetic seizures", this videotape of Petitioner's release shows that he was released in fine health, laughing and joking with the officers processing his release. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 1, Plaintiff's Complaint; and Exh 3, Lt. Brown's Police Report; RE 52 Petitioner's Motion for Summary Judgment, ¶¶ 4, 7, 13-14, and Exh K). Petitioner was *never* able to produce a valid CCW permit. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 14, Burkhart's Police Report). Although Petitioner claimed that the alleged failure to provide medical treatment resulted in diabetic seizures, he has presented no medical evidence that such is true. The letter from Petitioner's endocrinologist, which is attached to Petitioner's Motion for Summary Judgment as Exh K, failed to indicate that Petitioner experienced the onset of seizures after his November 20, 1997, arrest.

Thereafter, the Oakland County Prosecutor authorized a complaint and warrant against the Petitioner, charging him with Carrying a Concealed Weapon and Driving While License Suspended. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 16, Complaint and Warrant charging Weapons - Carrying Concealed; and Operating - License Suspended, Revoked,

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4. This is contrary to Petitioner's Complaint, wherein he claimed he suffered 9 hours of incarceration. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 1, Plaintiff's Complaint).

Denied/Allowing a Suspended Person to Operate). On January 26, 1998, following a preliminary examination, Petitioner was bound over to the Oakland County Circuit Court to stand trial on both charges. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 17, Bindover Order). Trial was scheduled for June 22, 1998.

B. Trial Court Proceedings.

In the meantime, on or about November 25, 1997, just five days after his most recent arrest, Petitioner filed the present cause of action, against the City of Farmington Hills and the Farmington Hills Police Department, alleging violations of his rights under the Sixth, Eighth and Tenth Amendments of the United States Constitution. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 1, Plaintiff's Complaint).

Plaintiff entered a default against the Defendant, Farmington Hills Police Department. A Motion to Set Aside the Default was entered immediately. It was granted by the trial court. (RE 20, Order Setting Aside Default).

On or about May 26, 1998, Petitioner filed a Motion for Summary Judgment, seeking summary resolution of his claims, together with damages in the amount of $10,000,000. (RE 52 Plaintiff's Motion for Summary Judgment). However, for the reasons set forth more fully below, Petitioner's cause of action was utterly devoid of factual or legal merit. Defendants then filed their Counter-Motion for Summary Judgment, seeking dismissal of Petitioner's claims against them, in their entirety, with prejudice, and request an award of costs, including reasonable attorneys fees, necessitated by their defense of this spurious action. (RE 63 Defendant's Counter-Motion for Summary Judgment).

C. Appellate Proceedings.

Petitioner filed a Notice of Claim of Appeal to the Sixth Circuit Court of Appeals from the Order Setting Aside the Default that Petitioner had entered against the Police Department only on February 2, 1998. (RE 20 Order Setting Aside Default). Although

a Briefing Schedule was sent out by the Court on March 9, 1998, Defendants filed a Motion to Dismiss asserting a lack of jurisdiction in the appellate court because the Petitioner was appealing an Order Setting Aside a Default. This appeal was not ripe because the lower court matter had not reached a final judgment in the case. Since the Petitioner was not appealing from the final order of the District Court, then the appellate court did not have jurisdiction. The Court of Appeals held the Briefing in abeyance while the Motion was pending until it granted the Motion and Order dismissing the appeal for lack of jurisdiction by an Order entered on April 22, 1998. (RE 93 Opinion and Order entered 8/11/98). Notwithstanding his untimely Motion for Rehearing, Petitioner filed this Petition to the United States Supreme Court. Subsequently, he filed a Notice of Claim of Appeal from the final order, Docket No. 98-1936, and has filed his Brief on Appeal in that case with the Sixth Circuit Court of Appeal.

REASONS FOR DENYING THE WRIT

I. THE APPELLATE COURT PROPERLY GRANTED A DISMISSAL BASED ON THE LACK OF JURISDICTION FOR THE REASON THAT THE PETITIONER DID NOT APPEAL FROM THE FINAL ORDER.

Appellate jurisdiction is found at 28 U.S.C. § 1291:

> **1291. Final decisions of district courts**
>
> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals *from all final decisions* of the district courts of the United States . . . (Emphasis added).

This Petition is taken from the Appellate Court's dismissal of Petitioner's Appeal for lack of jurisdiction because Petitioner incorrectly filed a Notice of Claim of Appeal from the Order Setting Aside the Default mistakenly entered against the Police Department. A final order is defined as an order which "terminates

all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined." *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 543 (6 CA 1986).

Simply, an Order Setting Aside a Default is not a final judgment for purposes of appealability. *Kummer v. United States*, 140 F.2d 191, 192-93 (5 CA 1945). Petitioner provided no legal authorities that states otherwise. Instead, Petitioner incorrectly relies on the cases that consider the setting aside of the default in appeals that had properly invoked appellate court jurisdiction. Petitioner's very own pleadings to this Court provided a copy of the final decision that was entered on August 11, 1998, after this appeal had been filed. Unquestionably, the appellate court did not nave jurisdiction over the first appeal.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THE TRIAL PROPERLY GRANTED THE MOTION TO SET ASIDE A DEFAULT.

A default can be set aside by a trial court upon a showing of good cause by the defaulted party. Fed. R. Civ. P. 55(c). In deciding whether to set aside a default, the court considers three factors: (1) whether a meritorious defense has been presented in support of Defendant's motion; (2) whether granting of the motion would prejudice the Petitioner; and (3) whether the Defendants' failure to plead was due to excusable neglect or mistake. *Shepard Claims Service v. William Darrah & Associates*, 796 F.2d 190 (CA 6, 1986); *Bieros v. Nicola*, 851 F. Supp. 681 (E.D. Pa. 1994). As the court in *Shepard* has stated:

> . . . When the first two factors militate in favor of setting aside the entry [of default], it is an abuse of discretion for a district court to deny a Rule 55(c) in the absence of a wilful failure of the moving party to appear and plead. 796 F.2d at p. 194.

In this case, the Farmington Hills Police Department has a meritorious defense to any claim brought by the Petitioner.

Furthermore, the courts have found that miscommunication between counsel and a party, or inadvertence in properly forwarding a complaint through channels to counsel constitutes excusable neglect, and cannot form a basis for a default. *Bieros, supra*. In this case, defense counsel was informed that service of process was effected on December 2, 1997. If that information were true, Respondents' Answer was timely filed. For that reason, the trial court did not abuse its discretion in setting aside the default. Petitioner clearly was not prejudiced in that one is not prejudiced in losing something that they never had available because Petitioner could not bring a lawsuit against the Police Department. In fact, Petitioner continued this frivolous action against the remainder of the municipal Defendants.

III. THIS COURT SHOULD DENY THE PETITION BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT THE FARMINGTON HILLS POLICE DEPARTMENT IS NOT AN ENTITY SUBJECT TO SUIT AND SUMMARY JUDGMENT FOR THAT PARTY WAS PROPER.

The legal rule that a Police Department is not a legal entity which is subject to suit under state or federal law has long been established. *Moomey v. City of Holland*, 490 F. Supp. 188, 190 (W.D. Mich. 1980); *McPherson v. Fitzpatrick*, 63 Mich. App. 461, 464, 234 N.W. 2d 566 (1975). Consequently, the Farmington Hills Police Department had an absolute legal defense to all of Petitioner's claims in this case. The trial court agreed, see its opinion, n.5.

IV. THIS COURT SHOULD DENY THE PETITION BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT NO CONSTITUTIONAL VIOLATION HAD OCCURRED AND THE PETITIONER'S ARREST WAS BASED ON PROBABLE CAUSE.

Procedurally or substantively, this matter was properly dismissed. Petitioner's claims purportedly arise out of the Sixth, Eighth and Tenth Amendments to the United States Constitution. (Exh 1). His Complaint, however, neglected to specify any legislation such as 42 U.S.C. § 1983 that permits him to proceed in a private cause of action for violation of these constitutional rights. Thus, summary judgment for Respondents would have been proper on that basis.

A. Petitioner failed to establish any unconstitutional policy.

The City is not liable because Petitioner failed to show the municipal entity, through a recognized custom, policy or practice caused the deprivation of constitutionally protected rights. *Monell v. Dept of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). A municipality cannot be held liable on a theory of *respondeat superior* for the alleged torts of its employees. *Monell, supra*; *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). This policy can be shown only through a course of unconstitutional conduct that is so permanent and well settled as to virtually constitute law. *Barcume v. City of Flint*, 819 F. Supp. 631 (E.D. Mich. 1993); *Hilliard v. Walker's Party Store*, 903 F. Supp. 1162 (E.D. Mich. 1995). Evidence of isolated incidents of unconstitutional activity do not suffice. *Oklahoma City, supra*. In fact, even if a municipal "policy" leads to police misconduct, it is insufficient to satisfy the *Monell* requirements for municipal liability; the Petitioner must show that the particular policy was the "moving force" behind a constitutional violation. *Id.* A civil rights litigant must establish the necessary causal link between the municipality as a defendant, and the deprivation of constitutionally-protected rights. *Id.*

Here, Petitioner failed to either plead or prove the existence of a custom or policy depriving citizens of their civil rights, which is so permanent and well settled in the City of Farmington Hills as to virtually constitute law. Instead, Respondent attempted to show a pattern of discrimination through reference to other proceedings, all of which were decided in favor of the entity and held that *the City of Farmington Hills, or its Police Department, had not engaged in a custom or practice of depriving persons of their civil rights. Ziegler v. City of Farmington Hills Police Department*, 902 F.2d 36 (1990) (Exh 18); *Willing v. City of Farmington Hills*, 159 Mich. App. 366, 406 N.W. 2d 298 (1987); and State of Michigan Dept of Civil Rights Notice of Disposition Regarding Complaint Filed by Perrion L. Robbins v. Farmington Hills Police Department (Exh 19). (RE 93, Opinion and Order, 7-8). The trial court agreed with Respondent's argument.

Simply, Petitioner failed to provide any evidence of an unconstitutional policy. Consequently, the trial court properly granted summary judgment in favor of Respondents. Judgment can be affirmed on this basis.

B. No constitutional violation occurred.

Furthermore, if no constitutional deprivation is suffered, then there can be no liability on the part of the governmental body. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986); *Spears v. City of Louisville*, 27 F.3d 567 (6 CA 1994).

Petitioner's claims failed because he was unable to show that he was deprived of rights secured by the United States Constitution. *Heller, supra*; *Spears, supra*. Petitioner has alleged that he was subject to an illegal traffic stop in violation of his Sixth Amendment right to be free from unreasonable searches and seizures; his Eighth Amendment right to a speedy trial; and the Tenth Amendment right to be free from cruel and unusual punishment. (Exh 1, ¶3). However, there is no Sixth Amendment prohibition against

unreasonable searches and seizures; no Eighth Amendment right to a speedy trial; and no Tenth Amendment prohibition against "cruel and unusual punishment. His claims must fail because no deprivation of any right secured by the Sixth, Eighth or Tenth Amendments was shown to be violated.

1. Probable Cause Supported Each Arrest.

Both of Petitioner's arrests were supported by probable cause. Petitioner was, in fact, convicted by a jury for the charges arising out of the April 13, 1996 stop. Secondly, he was bound over following a preliminary exam on the charges arising out of his November 20, 1997 arrest. Therefore, independent voices concluded that the officers acted with probable cause. Petitioner's claim must fail for that reason alone. *Criss v. City of Kent*, 867 F.2d 259 (6 CA 1988).

Likewise, Petitioner's allegations of assault, occasioned by application of handcuffs when he was taken into custody, are contradicted by the facts themselves. It is well settled that where, as here, an officer is making a lawful arrest, the failure to loosen tight handcuffs does not rise to the level of a constitutional violation. *Ford v. Gruwell*, 961 F.2d 219 (10 CA 1992); *Darnell v. Phillips*, 419 F.2d 247 (4 CA 1990); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1067 (8 CA 1990); and *Swanson v. Fields*, 814 F. Supp. 1007 (D. Kan. 1993).

"[A]ll claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' test." *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6 CA 1996) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989). This test, like the test for qualified immunity,

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the

> officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396. The "reasonableness" of an officer's use of force is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

Petitioner has attempted to be more specific on his various Briefs on Appeals to the various federal, appellate levels. Notwithstanding, Petitioner fails to comprehend the illogical nature of his arguments. He refuses to understand that his arrest was proper as shown by his convictions and the undeniable fact that his license was suspended at the time he arrived in Michigan.

The charges in the second arrest were supported by probable cause. Petitioner's license plate was incontrovertibly, improperly displayed under M.C.L.A. 257.255; M.S.A. 9.1955, which states:

> (1) Except as otherwise provided in this chapter, a person shall not operate, nor shall an owner knowingly permit to be operated, upon any highway, a vehicle required to be registered under this act unless there is attached to and displayed on the vehicle, as required under this act unless there is attached to and displayed on the vehicle, as required by this chapter, a valid registration plate issued for the vehicle by the department for the current registration year. A registration plate shall not be required upon any wrecked or disabled vehicle, or vehicle destined for repair or junking, which is being transported or drawn upon a highway by a wrecker or a registered motor vehicle.

After being stopped, it was discovered he was driving in Michigan with a suspended license. The City did *not* suspend his license, only the Secretary of State can suspend a license. M.C.L. 257.319-321(b); M.S.A. 9.2019. Police officers have

no choice but to arrest for a driving on a suspended license because they cannot issue a ticket and permit the individual to drive away. Moreover, the fact Petitioner obtained a valid Ohio license has no bearing on his conviction for driving in Michigan on a suspended Michigan license. *People v. Glantz*, 124 Mich. App. 531, 335 N.W. 2d 80 (1983); *People v. James*, 36 Mich. App. 550, 194 N.W. 2d 57 (1971).

Because the LEIN showed that Petitioner did have a suspended Michigan License, he was properly arrested. Individuals cannot avoid the deterrent of "suspension" of their license by merely going to an adjacent state and obtaining a license under false or suspect pretenses in order to avoid the State of Michigan's penalties for failing to follow the law. Most importantly, Michigan does not recognize an exception to the illegality of driving with a suspended license when a valid license from another state is obtained. Under any circumstance, his Michigan license was suspended and his arrest was proper.

Moreover, Petitioner's gun permit showed that he was a resident of Detroit. Yet, he carried an Ohio driver's license based upon his alleged "business" residence in Ohio. Petitioner cannot have it both ways and reside in two different places. Even if Petitioner asserts that he is an Ohio resident, then his gun permit was ineffective and inaccurate because it was issued by Wayne County. (It was ultimately revoked by Wayne County.)

Petitioner's arrest based on the concealed weapons charge was a valid arrest. Guns were found at the time officers were inspecting the vehicle pursuant to the abandonment statute, M.C.L. 257.252(d); M.S.A. 9.1952, and his arrest. Undisputedly, his gun permit was not on his person. Secondly, it had been revoked, first when he failed to show for the hearing, and subsequently at the actual hearing. He simply had no valid gun permit in any place at this time. M.C.L. 28.426(6); M.S.A. 28.93 provides:

> The licensee shall carry the license upon his or her person when carrying a pistol concealed upon his

> or her person or when carrying the pistol, whether or not concealed, in a vehicle occupied by the licensee. The licensee shall display the license upon the request of a peace officer.

Lastly, Petitioner's constitutional rights after the proper arrest were shown *not* to be violated. Even a cursory review of the videotape evidence and the sworn reports of the various officers involved demonstrates that the Petitioner never encountered unreasonable force. *Graham v. Connor, supra*. Plaintiff's "speedy trial" claim is utterly devoid of merit. *United States v. Ciammitti*, 720 F.2d 927 (6 CA 1983), *cert. denied*, 466 U.S. 970. Respondent incorporates by reference the argument stating that Petitioner's denial of medical treatment is also without merit.

On appeal, Petitioner now asserts that M.C.L. 257.321a; M.S.A. 9.2021(1) is unconstitutional. This defense should have been raised at the time of his criminal proceedings. If it was raised, the state district court must have found it to be without merit. On its face, the statute is constitutional because it clearly provides for suspension of a license *if* a person fails to answer a citation or fails to appear in court. Neutral on its face, this provision is neither overbroad nor vague. Furthermore, it applies equally to all individuals. It provides for a 28-day notice after the determination of noncompliance is made and an opportunity to appeal by way of a Petition to the circuit court. M.C.L. 257.323; M.S.A. 9.2023.

Moreover, the impoundment statute was properly invoked in this instance where Petitioner was being arrested. Under M.C.L. 257.252(d); M.S.A.1.1952(4), an automobile of a person being arrested must be impounded for safe keeping and, in this instance where allegedly unauthorized weapons were discovered, necessary. In *Auto Club Ins Assn v. Farmington Hills*, 220 Mich. App. 92, 559 N.W. 2d 314 (1997), the court concluded that the cost and fees for 2 years of storage would be paid by the individual arrested and that the failure to provide written notice was not a violation of the statute in that the person had actual notice of the impoundment because he was present when he was arrested and was informed

of the impoundment. Abandoned automobiles cannot be left alongside public roads as possible obstructions for an indefinite period. Here, Petitioner had no valid license and was not permitted to drive so that he would not have been able to remove it himself. Under either subsection (a) or (b), this vehicle was properly impounded because once Petitioner was arrested, the vehicle was abandoned.

In his Complaint, Petitioner maintained that he has been subjected to repeated police harassment. Yet, in his statements before the Wayne County Concealed Weapons Licensing Board, Petitioner states that he has had only two previous contacts with the Farmington Hills Police Department. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, at p. 24). He admitted that he has been treated fairly during the prior contacts and did not receive a traffic citation. (*Id.*) Clearly, these two prior contacts, during which Petitioner was fairly treated, belie Petitioner's claims of harassment. His alleged statistical evidence is neither substantiated nor supportive of this claim. The statistics do not prove that the arrests were improper in these instances. Otherwise, based upon his theory, no African American could be arrested at all.

In conclusion, Defendant City of Farmington Hills cannot be found liable for these merit less constitutional claims because the arrests were proper, the search was legal, and no excessive force was evidenced.

V. THIS COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE OF CONSTITUTIONALITY WAS NOT RAISED BELOW, AND FURTHERMORE THE STATE ABANDONMENT STATUTE IS CONSTITUTIONAL.

Petitioner attempts to argue that M.C.L. 257.252(d); M.S.A. 9.1952(4) is unconstitutional, but failed to set forth authority or argument.[5] M.C.L. § 257.252(d); M.S.A. § 9.1952(4) provides:

> (1) A police agency or a governmental agency designated by the police agency may provide for the immediate removal of a vehicle from public or private property to a place of safekeeping at the expense of the registered owner of the vehicle in any of the following circumstances:
>
> (a) If the vehicle is in such a condition that the continued operation of the vehicle upon the highway would constitute an immediate hazard to the public.
>
> (b) If the vehicle is parked or standing upon the highway in such a manner as to create an immediate public hazard or an obstruction of traffic.
>
> * * *
>
> (e) If the vehicle must be seized to preserve evidence of a crime, or when there is reasonable cause to believe that the vehicle was used in the commission of a crime.
>
> * * *
>
> (g) If the vehicle is hampering the use of private property by the owner or person in charge of that property or is parked in a manner which impedes the movement of another vehicle.

---

5. Moreover, even if the Petitioner was arrested under a statute that is later determined to be unconstitutional, no cause of action exists. *Michigan v. DeFillippo*, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

Here, Plaintiff's vehicle could not be permitted to remain unattended indefinitely alongside a public road.

> Here, the police officers properly removed the vehicle from the scene of the accident "to a place of safekeeping at the expense of the registered owner of the vehicle" pursuant to § 252d(1)(e). This provision makes the vehicle owner responsible for the costs of removal and safekeeping. Because petitioner became the owner of the vehicle, it is responsible for towing and storage costs under § 252d(1)(e). Petitioner argues that § 252d(1)(e) makes owners responsible only for short-term storage until they redeem their vehicles. However, the statute clearly addresses situations where a vehicle is impounded in connection with a criminal prosecution. Criminal prosecutions are frequently not completed until many months or even years after the incidents giving rise to them. Accordingly, in the absence of language limiting the time frame of such "safekeeping," we assume that the Legislature contemplated that vehicles might be stored for extended periods pursuant to § 252d(1)(e). requirements of § 252d. *Auto Club Ins Assn v. Farmington Hills*, 220 Mich. App. 92, 96-97, 559 N.W.2d 314 (1996).

Unquestionably, Petitioner was properly arrested as a consequence of a suspended license and concealed weapons that were found in the car. Moreover, the car could not be left without a driver to remove the vehicle from the public premises and for safekeeping reasons. The procedures under the statute were followed and adequate notice was provided because Petitioner was present at the time. The constitutionality of the statute was not considered in *Auto Club*, *supra*, but again it is neither overbroad or vague and provides for notice and post-deprivation hearing and rights. Thus, it is not unconstitutional and was not unconstitutionally applied.

VI. THIS COURT SHOULD DENY THE PETITION BECAUSE PETITIONER'S DENIAL OF MEDICAL TREATMENT IS ALSO FRIVOLOUS WHERE VIDEOTAPES AND RECORDS SHOW THAT PETITIONER WAS PROVIDED WITH MEDICAL TREATMENT.

Respondent adopts by reference all the factual evidence provided to the court herein to show this Court that Petitioner's assertions are, in fact, total misrepresentations of what occurred. Petitioner *was* taken to Botsford Hospital where he received treatment. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 13, Botsford Hospital aftercare instructions). Thus, any medical condition could have been and would have been provided at the hospital. Any serious medical need would have been addressed.

In his Complaint, Petitioner suggests that he was hospitalized because of an injury to his wrist occasioned by Defendants' use of handcuffs. (Exh 1, ¶3). However, Petitioner's aftercare instructions from Botsford Hospital indicate that he was treated for abdominal pain, rather than an injury to his wrist. (Exh 13). Moreover, although Petitioner complained of wrist pain at the time his medical history screening questionnaire was completed, the document indicates an absence of injury. (Exh 10).

The trial court stated as follows:

> On the way to the station, [Petitioner] advised the officers that he was a diabetic and that he needed insulin. [Petitioner] was transported to the hospital, where he received treatment and was then taken to the station at approximately 8:37 p.m. At approximately 10:45 p.m., [Petitioner] told Sergeant Robert Burkhart that he felt cold and numb and that he needed to return to the hospital for an insulin shot. Burkhart indicated on his report that the hospital paperwork indicated abdominal pain and did not mention a diabetic

> condition. According to Burkhart's report, [Petitioner] indicated that he would be fine if he were provided with an extra blanket and soon released. [Petitioner] was released at 1:30 a.m. on November 21, 1997.
>
> [Petitioner] acknowledges that he was treated for pain related to his diabetes at the hospital and that the doctor told him that if the pain returned, he should return to the hospital. [Petitioner] claims that the police officers ignored his requests to return to the hospital.

Although Petitioner claims that the alleged failure to provide medical treatment resulted in diabetic seizures, he presented no medical evidence to support his claim. The letter from Petitioner's endocrinologist, which was attached to Petitioner's Motion for Summary Judgment as Exh K, failed to indicate that Petitioner experienced the onset of seizures after his November 20, 1997, arrest. The jail records failed to so indicate. The video tape reveals a healthy, often jovial Petitioner. Furthermore, the Petitioner was at the hospital and could have mentioned or requested treatment for that condition. On the contrary, all of the evidence indicated that Petitioner received all necessary medical treatment, thus defeating his cruel and unusual punishment claim. *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). A mere delay in medical treatment is not a constitutional violation. *Tyler v. Rapene*, 603 F. Supp. 268 (DC Pa. 1985); *Gandreault v. Mun. Of Salem, Mass.*, 923 F.2d 203 (1 CA 1990), *cert. denied*, 500 U.S. 956 (1991).

CONCLUSION

Simply, Petitioner's claims of constitutional deprivation are not supported by the law or the facts. This Court should and can deny the Petition for any of the reasons submitted to the Court by Respondent.

Respectfully submitted,

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(3)

Record No. 98-468

Supreme Court, U.S.
FILED
NOV 24 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DUANE MONTGOMERY,

PETITIONER,

V.

CITY OF FARMINGTON HILLS; FARMINGTON HILLS POLICE DEPARTMENT,

RESPONDENTS.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. The Petitioner's Response to Respondent's statement: THE APPELLATE COURT PROPERLY GRANTED A DISMISSAL BASED ON THE LACK OF JURISDICTION FOR THE REASON THAT THE PETITIONER DID NOT APPEAL FROM THE FINAL ORDER.

The Court must consider the transcript of the MOTION HEARING AND STATUS CONFERENCE held on January 14, 1998. The District Court issued the Opinion that ***"Well, the biggest problem I have is the police department is not an entity that can be sued"*** (see page A-7 of this Appendix). The District Court further states ***"You're not hearing what I'm saying. The police department can't be sued. It's not a case of taking a default. The police department doesn't exist as an entity. It's just a department of the city. Okay?*** (see page A-7 of this Appendix). The District Court Continues to states ***"So you can't sue city departments You sue the city, fair enough? So you can't go sue this department and than department, because they are not legal entities."*** (see page A-8 of this Appendix).

This Supreme Court must consider the clear and direct Opinion and Judgment of the District Court during the hearing held on January 14, 1998. A final judgment means the Judge hearing the case has made up his or her mind. Review of the transcript of the January 14, 1998, motion hearing shows that the District Court had made a decision regarding the liability of the Farmington Hills Police Department (FHPD).

The District Court also established the fact that the District Court will not allow any judgment against the Farmington Hills Police Department. The District Court did abuse its discretion in Ordering "Entry of Default To Be Set Aside". By granting the Farmington Hills Police Department motion, the District Court discretion was prejudicial to the Petitioner by allowing the Farmington Hills Police Department immunity from any violation of the United States Constitution

and prevents the Petitioner from seeking any further action or relief, against the Farmington Hills Police Department, Farmington Hills, Michigan Oakland County.

The Court of Appeals had jurisdiction over the subject matter of this appeal, because the Petitioner objected to the District Court determination of the liabilities of the FHPD, as authorized under Title 28 section 1292 of the Judiciary and Judicial Procedure.

II. The Petitioner's Response to Respondent's statement: THIS COURT SHOULD DENY THE PETITION BECAUSE THE TRIAL PROPERLY GRANTED THE MOTION TO SET ASIDE A DEFAULT.

The District Court used the FHPD's claim of non-entity status as cause for setting aside the default. This legal entity status targets the liabilities of the parties and the rights of the Petitioner to recover from the FHPD. Since the District Courts justified its order based on liabilities, the Court of Appeals had jurisdictions of appeal. Furthermore, the Petition for Writ of Certiorari has shown that the Court of Appeals have accepted similar appeals. The District Court has in effect dismissed the Farmington Hills Police Department as a party to this case for reasons that the Petitioner can not claim relief, then the District Court's actions must conform to Fed. R. Civ. P. 12(b)(6).

Under Rule 12(b)(6), "*the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,..*" . Under Fed. R. Civ. P. 56(c), motions must be served at least ten (10) days before the time fixed for the hearing. Review of the record will show that the Defendants did not file the motion until January 5, 1998. The hearing was held on January 14, 1998. The Defendants failed to serve the motion at least ten (10) days before the hearing as required by Fed. R. Civ. P. 56(c). Michigan Law does allow actions to be brought against a governmental unit identified in its own name of Farmington Hills Police Department under M.C.L.A

600.2051(4). The matter of dismissing a party without regards to 42 U.S.C. $ 1983 or 1985 must be considered prejudicial against the Petitioner and thus fails to meet the requirements for setting aside a default under Fed. R. Civ. P. 55(c) or 60(b).

Also, the FHPD have failed to supply a meritorious defense to why the Petitioner was not allowed to take the required insulin. Furthermore, if the District Court Order setting aside default is not reversed, the Petitioner has no other method of challenging the Farmington Hills Police Department directly for the unconstitutional acts performed by the Farmington Hills Police Department.

Finally, the Supreme Court must consider the fact that the District Court (see page A-6 of Petition) relied on the Michigan Court of Appeals **McPherson v. Fitzpatrick, 63 Mich.App. 461, 464 (1975),** " *A municipal department, board, or commission, such as the Detroit Police Department, is unable to raise funds for payment...*" However, the Petitioner has shown on page A-112 of the Petition, and page A-30 of this Appendix, that the FHPD has raised funds on its own by applying for grant funds from the Department of Justice.

An impartial decision requires an equal opportunity to submit evidence in support of the Petitioner's claims. To make such statements at the hearing held on January 14, 1998, before any counter-evidence is reviewed, violated the District Court's oath of impartially discharging duties. Equal Rights to the poor and to those whom can not afford a lawyer must be enforced.

The District Court concluded before any evidence was submitted by the Petitioner, that the Police Department can not be held liable. This District Court's statement targets the liability of the respondent, Farmington Hills Police Department.

III. The Petitioner's Response to Respondent's statement:

THIS COURT SHOULD THE PETITION BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT THE FARMINGTON HILLS POLICE DEPARTMENT IS NOT AN ENTITY SUBJECT TO SUIT AND SUMMARY JUDGMENT FOR THAT PARTY WAS PROPER.

Generations ago, an African American was considered property. For Generations, there were many laws on the books that enforced this country's illegal ideas. Just because a law exist, does not make it legal. This Petition for Writ Certiorari is the only conduit for identifying current laws which may continue to violate our American Freedoms. The Petitioner has shown that the McPherson v. Fitzpatrick case law is no longer valid for the FHPD. As such, the District Court reliance on such case law was an abuse of discretion.

IV. **The Petitioner's Response to Respondent's statement: THIS COURT SHOULD DENY THE PETITION BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT NO CONSTITUTIONAL VIOLATION HAD OCCURRED AND THE PETITIONER'S ARREST WAS BASED ON PROBABLE CAUSE.**

The Respondents claim that the Petitioner's complaint neglected to specify any legislation such as 42 U.S.C. 1983 that permits him to proceed, is void of merit because the Petitioner's complaint is a pro se complaint. *Such complaints must be construed liberally, and held to "less stringent standards than formal pleadings drafted by lawyers."* **Haines v. Kerner**, 404 U.S. 519, 520 (1972). *"Allegations set forth by plaintiff in other documents are to be considered part of the complaint."* **Matzker v. Herr**, 748 F.2d 1142, 1148 n. 5 (7th Cir. 1984). Review of the Petitioner's Response to Defendants Motion for Summary Judgment (R. 67, Response by Plaintiff to motion for summary), outlines multiple charges

in U.S.C. 1983 and 1985. Thus, summary judgment for Defendants would NOT have been proper on that basis.

Petitioner's response to Respondents' claim that Petitioner failed to establish any unconstitutional policy.

The Petitioner's charged the Respondents for violation of the fourteenth amendment of the Constitution, 42 U.S.C.A. 1983, by enforcing M.C.L.A. 257.321(a). In support of this charge, the Petitioner submitted a complaint filed with the State of Michigan Department of Civil Rights by Perrion L. Robbins (page A-37 of Petition). This report shows that the Respondents have a policy of continual enforcement of M.C.L.A. 257.321(a) against African Americans traveling through the City of Farmington Hills. Furthermore on page 8 of the Brief in Opposition, the Respondents admitted to arresting the Petitioner for driving under a Suspended license under M.C.L.A. 257.321(a). However, this Court must consider the fact that M.C.L.A. 257.321(a) violates Due Process and that this Court must consider the fact that the opinion of the Michigan Attorney General which found that the "*Department of State alone has power to suspend and revoke a motor vehicle operator's license and can do so only for the reasons, conditions, and circumstances set forth in section M.C.L. 257.319, 257.321, and 257.321(b).* Op.Atty.Gen. 1970, No. 4454, p. 124. . The section 257.321(a) was NOT included in the Attorney General's opinion regarding laws that can be used to suspend a driver's license. The Respondents also states in the Brief of Opposition page 8, that "Petitioner was arrested for driving with a suspended Michigan driver's license and taken into custody. M.C.L. 257.904 ...". However this Court must consider the full text on page 8 which continues to state, "*A **person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in section 212** ...*". (see page A-29 of this Appendix). The Respondents have failed to produce any record of notification because the Petitioner was

NEVERED notified as required by M.C.L. 257.904. The Brief in Opposition on page 7 confirms that the Petitioner challenged the Michigan suspension at time of arrest and was entitled to a probable cause determination before the Petitioner was arrested and subjected to torturous cruel punishment by the Respondents (see **Murray S. Jacobson, Plaintiff, v. State of Illinois, Attorney General's Office, Criminal Division (Neil Hartigan, Attorney General), et al. , Defendants. No. 85 C 6480, United States District Court, N.D. Illinois, E.D.. Cite as: 1986 WL 4160 (N.D. Ill.)).** The Respondents' policy of enforcing M.C.L.A. 257.321(a) violates constitutional rights because of the Warrantless arrest base on information (**Richard E. Gerstein, State Attorney for Eleventh Judicial Circuit of Florida, Plaintiff-Appellant, v. Robert Pugh et al. No. 73** The arresting police officer Paul Nicholas stated on page A-75 and A-76 of the Petition, shows that the officer's statement proves that the Respondents performed a Warrantless arrest based on information which is unconstitutional (see page A-77 of Petition). The officer's statements also proves that the vehicle of the Petitioner was legally park in a private parking lot. The Respondents claim on page 22 of the Brief in Opposition reads " *alongside a public road*" as authorized under M.C.L. 257.252d. However, the Petitioner's vehicle was NOT alongside a public road. The Petitioner's vehicle was legally parked in a private parking lot not subject to the State Abandonment Statute. The seizure and search of the Petitioner's vehicle violated constitutional protection. Based on the statements of Officer Paul Nicholas, the Respondents have an established policy of enforcing M.C.L. 257.321(a). Furthermore, the Respondents' policy is in fact a Warrantless arrest based on information which has been established as unconstitutional.

Petitioner response to Respondents' claim that Probable Cause Supported Each Arrest.

The Respondents claim that the act of bounding the Petitioner over following a preliminary exam on charges arising out of the Petitioner's November 20, 1997 arrest proves that the officer acted with probable cause. However, the Respondents have failed to also disclose that the C.C.W. felony charge was dropped by the Oakland County Prosecutors Officer and/or Dismissed by the Oakland County Circuit Court and the State of Michigan has also failed to schedule a trial for the charge of Driving while License Suspended (People of the State of Michigan v Duane Montgomery case number 98-157635-FH before Honorable Jessica R. Cooper (248) 858-1000). The statement of Farmington Hills police (page A-34 of Petition) shows that the Petitioner was released only after family members were able to bring the Petitioner's C.C.W. permit to the Farmington Hills Police station. The action of holding the Petitioner and refusing the Petitioner's medical insulin until the Petitioner produced a C.C.W. permit shows that the continued detention and continued denial of medical insulin for the Petitioner was due to the arrest under the C.C.W. violation. However, as the transcript of Officer Paul Nicholas (see page A-63 of Petition), there was no probable cause to search the Petitioner's vehicle and thus there was no probable cause to arrest and detain the Petitioner on a C.C.W. violation. Officer Paul Nicholas stated that he searched the Petitioner's vehicle because the Officer was impounding the vehicle under M.C.L.A. 257.252(d). However, the Petitioner's vehicle was legally parked in a private parking lot. The impounding of the vehicle was unconstitutional because NONE of the conditions outline in M.C.L.A. 257.252(d) existed at the time of arrest. If the impoundment of the Petitioner's vehicle was unconstitutional then the search of the Petitioner's vehicle was also unconstitutional and also the arrest and detainment and deprivation of medical insulin, based on the results of the unconstitutional search, was also unconstitutional. The

Respondents have acknowledged that the Petitioner had a valid Ohio Drivers license.

This Court must consider the fact that the Petitioner has Never been convicted for driving in Michigan on a suspended Michigan license and that after one year after the arrest of the Petitioner for Driving While Suspended, the State of Michigan has failed to schedule a trial for the Petitioner due to the constitutional status of M.C.L.A. 257.321(a), (People of the State of Michigan v Duane Montgomery case number 98-157635-FH before Honorable Jessica R. Cooper (248) 858-1000, Oakland County Circuit Court). This Court must consider the fact that the arrest of the Petitioner on November 20, 1997 was a Warrantless arrest based on information. As shown in the Petition, a Warrantless arrest base on information is unconstitutional and thus the assault on the Petitioner does rise to the level of a constitutional violation.

The Respondents were "fishing" for any reason to stop and detain the Petitioner as part of the Respondents' ongoing unconstitutional policy of harassing African Americans as shown in the Respondents excessively high arrest rate among African Americans identified in the Petition. The fact that the Respondents did not have probable cause to stop the Petitioner is enforced by reviewing the statements of the two arresting officers, Officers Nicholas and Officer Newcomb, which is outline below.

The Initial Probable Cause Discrepancy

The incident which gave rise to this action between the Respondents and the Petitioner occurred on November 20, 1997 at the intersection of Orchard Lake Road and Thirteen Mile Road in the City of Farmington Hills. Within the City of Farmington Hills, Orchard Lake Road runs South to North and Thirteen Mile Road runs East to West. This Court must also realize that Officer Nicholas (senior arresting officer with three years on the job) and Officer Newcomb (junior arresting officer with 4 months on the job (Hire dates on page A-61 of Petition) were driving in **separate** vehicles heading

southbound on Orchard Lake Road. This is supported by reviewing of the Police Report of junior arresting Officer Newcomb (see A-26 of Petition). Officer Newcomb's report states that Officer Newcomb's vehicle was behind the Petitioner's vehicle. Officer Newcomb's report further states that senior arresting Officer Nicholas' vehicle was on the right side of the Petitioner's vehicle. Officer Newcomb's reports continues to state that the Petitioner was not observed until the Petitioner's vehicle, Officer Nicholas' vehicle and Officer Newcomb's vehicle were all stop at the intersection on Orchard Lake Road at 13 Mile Road.

Based on the fact that only junior arresting Officer Newcomb was behind the vehicle of the Petitioner, the only officer able to make a probable cause determination of whether the Petitioner's license plate was allegedly improperly displayed would be junior arresting Officer Newcomb. Now it is important for this Court to consider the testimony of senior arresting Officer Paul Nicholas in the transcript in the Appendix of the Petition, on page A-77. The parking lot of the small strip mall was located at the corner of 13 Mile Road and Orchard Lake Road, just a few feet from the intersection. The Petitioner's vehicle was pulled over in a matter of seconds from the point of first contact. This means that the Farmington Hills Police Officers did not follow or trail the Petitioner's vehicle for any measurable distance outside a few feet. Likewise, this means that the junior arresting Officer Newcomb must have made the probable cause determination while standing at the traffic light at the intersection. This allege act is also stated in the police report of the junior arresting Officer Newcomb. However, this is where the discrepancy starts. The junior arresting Officer Newcomb did Not make the probable cause determination. The probable cause determination was made by the senior arresting Officer Paul Nicholas. The police report of the senior arresting Officer Paul Nicholas, (see page A-18 of this Appendix), shows Officer Nicholas made the probable cause

determination and ordered the junior arresting Officer Newcomb to stop the Petitioner. However, this Court must consider the fact that the senior arresting Officer Paul Nicholas was not able to view the rear of the Petitioner's vehicle because Officer Nicholas vehicle was to the right of the Petitioner's vehicle. Furthermore, the Petitioner's vehicle Never past Officer Nicholas vehicle as stated in Officer Nicholas police report. Therefore, it was physically impossible for the senior arresting Officer Nicholas to view the license plate of the Petitioner's vehicle. The senior arresting Officer Nicholas could not legally make a probable cause determination without having a rear view of the Petitioner's vehicle. This discrepancy is an issue of great importance because probable cause must have existed before the Respondents stopped the Petitioner, and not created or discovered after the traffic stop was made. The Respondents have stated that the Respondents had probable cause to stop the Petitioner on November 20, 1997. However, the discrepancy of whether the senior arresting Officer Paul Nicholas made the probable cause determination without actually seeing the rear of the Petitioner's vehicle raises a genuine issue that this Court must consider.

CONCLUSION

The Petitioner, as shown on page A-33 in this Appendix, has exhausted all other measures to challenge Michigan M.C.L.A. 257.321(a). Wherefore, the Petitioner respectfully request that this Court Grant this Petition for Writ of Certiorari.

Respectfully,
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November 24, 1998
Date

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUANE MONTGOMERY,
Plaintiff,

v Case No: 97-CV-75838-DT

CITY OF FARMINGTON HILLS and
FARMINGTON HILLS POLICE DEPARTMENT,

Defendant./

MOTION HEARING AND STATUS CONFERENCE
BEFORE THE HONORABLE PATRICK J. DUGGAN
United States District Judge
251 U.S. Courthouse
231 West Lafayette
Detroit, Michigan 48226

(January 14, 1998)

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EXHIBITS

None offered.

MONTGOMERY v. FARMINGTON HILLS

Detroit, Michigan
Wednesday, January 14, 1998
At 2:23 p.m.

- - -

COURT CLERK: This Court is now in session. You may be seated. Civil action number 97-75838, Duane Montgomery versus City of Farmington Hills, et al.

THE COURT: Identify yourselves for the record.

MR. MONTGOMERY: Sir, I'm the plaintiff, Duane Montgomery.....

THE COURT: All right.

MR. ROSATI: Your Honor, I'm Mike Rosati here for the defendants.

THE COURT: All right. We have a number of matters. Number one, we have defendant's motion to set aside a default judgment; is that correct?

MR. ROSATI: That's to set aside a default, Your Honor –

THE COURT: The default, rather, I'm sorry.

MR. ROSATI: Yes.

THE COURT: Do you want to address it?

MR. ROSATI: Briefly, Your Honor. When I received this file, I was told that the defendants were served on December 2nd. I filed an answer for both defendants, the City of Farmington and Farmington Hills Police Department in 20 days from that date, by the 22nd. I was informed after that that the Clerk had entered a default against the police department only, because the police department had been sent the complaint possibly five, six days earlier.

Immediately upon finding that out, I filed the motion to set aside the default, Your Honor, for the reasons set forth in that motion. In large part, because Farmington Hills Police Department doesn't exist as a legal entity. I would ask that you set aside the default.

THE COURT: Mr. Montgomery, any response?

MR. MONTGOMERY: Yes, Your Honor. The summons was served on November the 26th of '97. I filed a return of service on or abou December 5th. I also have the green return receipt when one of the officers there had signed for the document.

Also, Your Honor, the judgment was – I put in a request for default on December the 16th and it was entered on December the 18th. The defendant didn't file any of the motions until January 5th, which was like an expiration of 17 days.

THE COURT: **Well, the biggest problem I have is the police department is not an entity that can be sued.**

MR. MONTGOMERY: Your Honor, I have tried – I didn't bring the document with me to prepare, because I wasn't expecting it to be today. I have it down in my car with basically was going to be the justification why I think the default should not be set aside.

THE COURT: **I understand. But you can't sue the police department in the first place. So if you can't sue them in the first place, you can't take a default against them.**

MR. MONTGOMERY: But, Your Honor, it was within the Court's discretion to enter into the default –

THE COURT: **You're not hearing what I'm saying. The police department can't be sued. It's not a**

case of taking a default. The police department doesn't exist as an entity. It's just a department of the city. Okay?

MR. MONTGOMERY: Yes, sir.

THE COURT: **So you can't sue city departments You sue the city, fair enough? So you can't go sue this department and that department, because they are not legal entities.**

MR. MONTGOMERY: Your Honor, I'm prepared right now. I do have the information that I wanted to cite to the Court, but I thought I had to get it in writing to send it to the Court. And I wasn't aware that I would be responding to the motion –

THE COURT: That's fair. But how will the information you have relate to what I just said to you?

MR. MONTGOMERY: Okay. Your Honor, as I was going through the Federal Rules of Civil Procedure on doing the serve – I think it was – I'm not sure, but I got to check again, I wrote down. It's under Rule Nine that unless the defendant was challenging jurisdiction on the Court that I wouldn't have to prove that the defendant was actually able to be sued or do any suit or legal entity. I think it was under Rule Nine-something.

THE COURT: My point is, if it's something, you can't be sued, you get a judgment against, you can't do

anything with it. It doesn't exist. You have to get a judgment against the city in order to recover. **A judgment against the police department isn't worth the paper it's on, is my point.** It's not an entity, so you've accomplished nothing. You've got to get your judgment against the city in order to recover money. Do you understand what I'm saying?

MR. MONTGOMRY: I understand, Your Honor.

THE COURT: So the Court is going to grant – I will let you bring up more information if you want it, but I don't know that you're understanding what I'm saying.

MR. MONTGOMERY: I understand, Your Honor. I guess my argument is I want to at least present why I feel this subsection of government entity should be considered.

THE COURT: Fair enough. When do you want to present that?

MR. MONTGOMERY: I can present it within a couple hours or at your earliest convenience.

THE COURT: It's up to you. Okay. Then the Court will hold – if you want to submit it in writing, you can. Is that what you want to do?

MR. MONTGOMERY: Yes. Yes, Your Honor.

THE COURT: All right. I will allow you to submit the response in writing to that. Now, let's talk about the next

motions to quash the subpoena. Mr. Rosati, do you want to deal with that?

MR. ROSATI: To be honest with you, I'm not really prepared to deal with it. I rely on the brief we filed. The basis that we initially had to quash the subpoena was the fact they were not issued by a Court officer. Secondly, though, we believe that the subpoenas themselves are overly broad and unduly burdensome in that they require entities other than the defendants to respond with document requests which are absolutely and utterly voluminous and impossible to comply with.

THE COURT: All right. Mr. Montgomery, do you want to respond?

MR. MONTGOMERY: Yes, Your Honor. Information that was requested in the subpoena is important to the case to show that there are other witnesses that have been involved in the same type of instance that I have, and the only way to show that I've been treated differently than they normally have been treated is to actually compare people who were pulled over for the same instance that I was and see what was the ramifications of that on the individual.

THE COURT: Your subpoena, if it's validly issued, I don't know that it is, is too broad. You're asking for just an incredible amount of documents.

MR. MONTGOMERY: Your Honor—

THE COURT: You're on a fishing expedition, okay. So now, if you have some basis and want some specific records the discovery process allows for, but just to say, "Give me all the tickets you've ever issued and tell me who they were issued to and give me names and addresses, that's too broad. I would never allow it.

MR. MONTGOMERY: Okay, Your Honor. But the idea is there may be witnesses who have been through the same instance that I have with Farmington Hills Police, and the only way I can find that out is to at least have access to that information.

THE COURT: I'm not going to let you have the names and addresses of every person who ever received a ticket. It's just too broad.

MR. MONTGOMERY: Okay, Your Honor.

THE COURT: First of all, I think it may be involving their privacy.

MR. MONTGOMERY: Well, Your Honor, I would like to have any type of position of how can I get a limited – if the time frame is too large, but I need some basis to be able to identify people who may have had the problem with Farmington Hills Police. And the only ones who would have the information is the police department. And Your Honor, I

also want to compare as – I was pulled over and arrested for – they said, a valid driver's license. I had a valid driver's license and I'm looking to compare how many other people were pulled over for not having a valid driver's license and what were the consequences of that –

THE COURT: What would that show?

MR. MONTGOMERY: Well, Your Honor, I gave the officer a valid Ohio driver's license. In his report he wrote everything on the driver's license, except he put a Michigan driver's license number in there and claimed that I gave him a Michigan license, and I did not. I gave him an Ohio license and that was the whole contingent for them arresting me.

THE COURT: And I have no problem with you defending your case, but I don't know what all these other records will do to help your case. Your case was your case.

MR. MONTGOMERY: Yes, Your Honor. When I go to show a motive as to why I was picked on, the only way I'm going to be able to identify any common thread and is actually look at those cases and say, "Well, a percentage was treated this way and a percentage was treated that way."

THE COURT: What to you mean treated this way or that way? Treated how?

MR. MONTGOMERY: Well, Your Honor, my belief is that the treatment I received from the Farmington Hills was

based on some type of characteristic that I'm trying to investigate with that information.

THE COURT: But you're on a fishing expedition. I'm just not going to let you say, "Give me all the tickets. I want to find out whoever got tickets ..." it's just too broad. You've got to have some basis for it.

MR. MONTGOMERY: My point is that I can't access any of the infor -- if it's too broad, let the Court please tell me what can I ask for.

THE COURT: Can't you get a lawyer to represent you on this?

MR. MONTGOMERY: No, I can't afford a lawyer for this, Your Honor, and that's the reason why I filed—

THE COURT: When you say "afford a lawyer," many of these cases are taken on a contingent basis.

MR. MONTGOMERY: I understand, Your Honor.

THE COURT: So it doesn't cost you anything if the lawyer takes it on a contingent basis.

MR. MONTGOMERY: But, Your Honor, this type of case, with experienced counsel, this case could be drastic budget for way beyond my means. Even though you say that they take it on a contingent basis. I don't think I'll be able to just get any attorney to take a case like this.

THE COURT: The problem I have is, I can't give you legal advice as to how to conduct your case. And I'm concerned that you're not going to be conducting it in a proper manner, whereas if you get a lawyer to assist you, you may not run into those problems. And it would just seem to me that you ought to certainly try to get a lawyer to represent you, and he or she knows what they can request.

MR. MONTGOMERY: Okay, Your Honor.

THE COURT: The Court is going to enter an order to quash the subpoenas as issued. I'm going to suggest that you try and get a lawyer. If not, you're going to have sit down and engage in some reasonable discovery.

MR. MONTGOMERY: Okay, Your Honor. And one question, Your Honor?

THE COURT: Sure.

MR. MONTGOMERY: Were you still going to hold off on setting aside the default until I can get something in writing?

THE COURT: Sure. Absolutely.

Now, let's schedule the case. How much time do you feel you need for discovery?

MR. ROSATI: I think 90 days is fine, Your Honor.

MR. MONTGOMERY: Your Honor, I'm going to need more than 90 days, because the information I've

submitted to the Michigan Department of Civil Rights, they need eight to ten weeks to get the information available and I have to give copies to him and then we're going to need at least another four to five weeks to review that information.

THE COURT: What kind of information are you talking about from the Michigan Department of Civil Rights?

MR. MONTGOMERY: I asked for all complaints filed against the Farmington Hills Police Department.

THE COURT: And they said it would take how long?

MR. MONTGOMERY: Eight to ten weeks. And that's basically because they have a backlog and I have to wait my turn.

THE COURT: Well, all right. I'm going to suggest you get a lawyer. You can start doing some other discovery in the meantime, but - -

MR. MONTGOMERY: Yes, Your Honor.

THE COURT: All right. Discovery by May 31st. Complete discovery by May 31, '98. Exchange witnesses by April 30th. Do the two sides wish the case to go to mediation?

MR ROSATI: Your Honor, I haven't had a response from my client yet as to whether they want mediation or not.

MR. MONTGOMERY: Your Honor, I'm 100 percent towards ability of going to mediation.

MR. ROSATI: I can have an answer to you within a week, Your Honor.

THE COURT: All right. I'm going to ask you, Mr. Rosati to sign this. I'll have plaintiff sign it. We will hold it. You will send us a letter. You will indicate that your client consents, we'll proceed. If not, we'll set it aside and there will be no mediation.

MR. ROSATI: Thank you, Your Honor.

THE COURT: So you understand what's happening, Mr. Montgomery, Mr. Rosati is going to let us know in a week or so whether his client agrees to mediation. I'm going to set it for mediation now - -

MR. MONTGOMERY: Okay.

THE COURT: But if he says no, then I'm going to cancel it. Okay?

MR. MONTGOMERY: Yes, Your Honor.

THE COURT: So I'm going to order the mediation on May 15th. You won't get a mediation hearing until the end of June. You'll get a notice from the Court on all this, okay - - you'll get a notice on mediation. No motions after June 15. Pretrial, Marilyn?

COURT CLERK: August 12, 2:30.

THE COURT: Okay. We'll set the trial for the month of September, October of '98. Both sides will get a list of the cases for that term on August 1. You should be close to number one, because I have not set too many cases that far in advance. Okay?

MR. ROSATI: Thank you, Your Honor.

MR. MONTGOMERY: Thank you, Your Honor.

(Court in recess at 2:38 p.m.)

- - -

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Signed Marie Jedreski Metcalf 03/04/98
Marie Jedreski Metcalf, CSMR-3274

CITY OF FARMINGTON HILLS POLICE DEPT.
31655 W. Eleven Mile Road- Farmington Hills, MI 48338
Phone 474-8181 ORI # MI6338900

NARRATIVE REPORT PAGE 1 OF 2

DATE	DAY	SHIFT	PLATOON	BADGE#	YR	INCIDENT NO.
112097	THR	03	03	035& 052	97	32240

On Above Date Writer was s/b Orch. Lk. Near Firwood when listed veh. was obs. Also s/b Orch. Lk. Next to writer. Writer obs. veh's license plate was propped up in the rear window of the veh. The third brake light was blocking the view of the letters of the plate. Veh. and writer came to 13 mile red light. Veh. would not pull past writer but stayed even w/ writer's veh. leaving 2-3 car lengths between his veh. & veh. ahead. Writer obs. that OFC. Newcomb was behind the veh. & advised him via MDT to stop the veh. for above mentioned viol.

OFC. Newcomb made traffic stop, Orch. Lk. S. of 13 Mile. OFC Newcomb spoke w/ driver & obtained registration & the driver's Ohio OPS. Writer checked driver through LEIN/SOS. MI S.O.S showed him suspended numerous times. Driver, Montgomery, was taken into custody for DWLS. Writer searched Montgomery's veh. & founded listed .45 cal. Semi-auto. Loaded (1 round in chamber) wrapped in a rag under the driver's seat where Montgomery was sitting. Writer asked Montgomery if he had a CCW permit for the gun. He said he did but it was at home. Further search of veh.

by writer revealed listed high capacity cobray magazine in compartment behind rear seats, 2 additional loaded magazines for the .45 in a blk bag in the trunk as well as Glock handgun (loaded, empty chamber) in blk bag, in trunk. Writer Completed inventory & impounded veh.

signed P. Nicholas # 35

CITY OF FARMINGTON HILLS POLICE DEPT.
31655 W. Eleven Mile Road- Farmington Hills, MI 48338
Phone 474-8181 ORI # MI6338900

NARRATIVE REPORT PAGE 1 OF 2

DATE	DAY	SHIFT	PLATOON	BADGE#		YR	INCIDENT NO.
112097	THD	03	03	052		97	32240

OFFICER NEWCOMB AND OFFICER NICHOLAS WERE SOUTH BOUND ON ORCHARD LAKE RD. STOPPED AT 13 MILE RD. OFC. NEWCOMB WAS BEHIND THE SUSPECT AND NICHOLAS WAS TO THE RIGHT OF THE VEHICLE. OFC NEWCOMB NOTICED THE SUSPECTS LICENSE PLATE IMPROPERLY DISPLAYED IN THE REAR WINDOW. THE VIEW OF THE PLATE WAS ALSO BLOCKED BY THE 3RD TAILLIGHT. NICHOLAS RAN WHAT HE BELIEVED TO BE THE PLATE (3889 FJ) WHICH RETURNED NO RECORD. OFFICERS STOPPED THE SUSPECT ON ORCHARD SOUTH OF 13 MILE AND APPROACHED THE SUSPECT. SUSPECT (DUANE MONTGOMERY JR B/M 04-29-67) DEMANDED TO KNOW WHY HE WAS STOPPED. OFC NEWCOMB ADVISED MONTGOMERY HIS PLATE WAS IMPROPERLY DISPLAYED. MONTGOMERY PRODUCE HIS OHIO DRIVERS LICENSE AND VEHICLE REGISTRATION. OFC NEWCOMB RAN MONTGOMERY THROUGH LEIN/SOS AND MONTGOMERY RETURNED WITH 5 SUSPENSIONS WITH NO PRIORS. MONTGOMERY ADVISED OFFICERS THAT HE LIVES IN OHIO AND THOUGHT HE COULD DRIVE IN MICHIGAN IF HE OHIO OPERATOR LICENSE WAS VALID. MONTGOMERY WAS ASKED TO EXIT TO THE VEHICLE AND WAS ADVISED HE WAS UNDER ARREST FOR D.W.L.S. MONTGOMERY WAS SEARCHED INCIDENT TO ARREST AND WHEN ASKED IF HE HAD ANY WEAPONS ON HIM HE STATED "NO, NOT ON ME" MONTGOMERY WAS PLACED IN THE PATROL AND OFC NICHOLAS CONDUCTED A SEARCH OF THE SUSPECT'S VEHICLE. OFC NICHOLAS DISCOVERED A SEMI-AUTO HAND GUN LOCATED UNDER THE DRIVERS SEAT.

MONTGOMERY ADVISED HE HAS A C.C.W. PERMIT BUT DID NOT HAVE THE PERMIT WITH HIM. MONTOGMERY ADVISED HE WAS ARRESTED LAST YEAR FOR C.C.W.

SIGNED
INVESTIGATION OFFICER
NEWCOMB

CITY OF FARMINGTON HILLS POLICE DEPT.
31655 W. Eleven Mile Road- Farmington Hills, MI 48338
Phone 474-8181 ORI # MI6338900

NARRATIVE REPORT PAGE 2 OF 2

DATE	DAY	SHIFT	PLATOON	BADGE#	YR	INCIDENT NO.
112097	THD	03	03	052	97	32240

UPON LEAVING THE SCENE AND EN ROUTE TO THE STATION. MONTGOMERY ADVISED HE IS DIABETIC AND DID NOT TAKE HIS AFTERNOON INSULIN. UPON ARRIVAL AT THE STATION, PARAMEDIC WERE SENT TO THE STATION AND MONTGOMERY WAS TRANSFERRED TO BOTSFORD HOSIPTAL. MONTGOMERY CONDITION IMPROVED. OFC NICHOLAS FURTHER SEARCH REVEALED AN ADDITIONAL WEAPON (SEE OFC. NICHOLAS SUP. REPORT) OFC GOBLE WITH OFC NEWCOMB AT BOTSFORD HOSPITAL.

SIGNED
INVESTIGATION OFFICER
NEWCOMB

MI ST 257.255
M.C.L.A. 257.255

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 257. MOTOR VEHICLES
MICHIGAN VEHICLE CODE
CHAPTER II. ADMINISTRATION, REGISTRATION, CERTIFICATE OF TITLE AND ANTI-THEFT
OFFENSES AGAINST REGISTRATION LAWS AND CANCELLATION OF REGISTRATION

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Current through P.A. 1998, No. 20

257.255. Motor vehicle registration; violation; penalty; international registration plan

Sec. 255. (1) Except as otherwise provided in this chapter, a person shall not operate, nor shall an owner knowingly permit to be operated, upon any highway, a vehicle required to be registered under this act unless there is attached to and displayed on the vehicle, as required by this chapter, a valid registration plate issued for the vehicle by the department for the current registration year. A registration plate shall not be required upon any wrecked or disabled vehicle, or vehicle destined for repair or junking, which is being transported or drawn upon a highway by a wrecker or a registered motor vehicle.

(2) Except as otherwise provided in this section, a person who violates subsection (1) is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days, or by a fine of not more than $100.00, or both. However, if the vehicle is a commercial vehicle which is required to be

registered according to the schedule of elected gross vehicle weights under section 801(1)(k), [FN1] the fine which may be imposed shall not exceed $500.00.

(3) A person who operates a vehicle licensed under the international registration plan and does not have a valid registration due to nonpayment of the apportioned fee is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days, or by a fine of not more than $100.00, or both. In addition, a police officer may impound the vehicle until a valid registration is obtained. If the vehicle is impounded, the towing and storage costs of the vehicle, and the care or preservation of the load in the vehicle shall be the owner's responsibility. Vehicles impounded shall be subject to a lien in the amount of the apportioned fee and any fine and costs incurred under this subsection, subject to a valid lien of prior record. If the apportioned fee, fine, and costs are not paid within 90 days after impoundment, then following a hearing before the judge or magistrate who imposed the fine and costs, the judge or magistrate shall certify the unpaid judgment to the prosecuting attorney of the county in which the violation occurred. The prosecuting attorney shall enforce the lien by foreclosure sale in accordance with the procedure authorized by law for chattel mortgage foreclosures.

MI ST 257.904
M.C.L.A. 257.904

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 257. MOTOR VEHICLES
MICHIGAN VEHICLE CODE
CHAPTER VIII. PENALTIES

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Current through P.A. 1998, No. 20

257.904. Operator's or chauffeur's license or registration; suspension, revocation or denial; penalty for operation of vehicle; subsequent offenses; confiscation of plates; status and record of persons

Sec. 904. (1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked **and who has been notified as provided in section 212 [FN1] of that suspension or revocation**, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state. A person shall not knowingly permit a motor vehicle owned by the person to be operated upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state by a person whose license or registration certificate is suspended or revoked, whose application for license has been denied, or who has never applied for a license, except as permitted under this act. A person who violates this subsection is guilty of a misdemeanor punishable

as follows:

(a) For a first violation, by imprisonment for not more than 90 days or a fine of not more than $500.00, or both. Unless the vehicle was stolen or used with the permission of a person who did not knowingly permit an unlicensed driver to operate the vehicle, the registration plates of the vehicle shall be cancelled by the secretary of state upon notification by a court.

(b) For a second or subsequent violation , by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both. Unless the vehicle was stolen, the registration plates of the vehicle shall be cancelled by the secretary of state upon notification by a court.

(2) Upon receiving a record of a person's conviction for unlawful operation of a motor vehicle while the person's license is suspended or revoked or of a person's conviction or civil infraction determination for a moving violation of the vehicle laws of this state or a political subdivision of this state while the person's license is suspended or revoked, the secretary of state immediately shall extend the period of the first suspension or revocation for an additional like period. This subsection applies only if the violation occurs during a suspension of definite length or if the violation occurs before the person is approved for a license following a revocation.

(3) Upon receiving a record of the conviction, bond forfeiture, or a civil infraction determination of a person for unlawful operation of a motor vehicle requiring a class 1, class 2, or class 3 indorsement or vehicle group designation while the indorsement or designation is suspended pursuant to section 319a or 319b, [FN2] or revoked, the secretary of state immediately shall extend the period of suspension or revocation for an additional like period. This subsection

applies only if the violation occurs during a suspension of definite length, if the violation occurs before the person is approved for a license following a revocation, or if the person operates a commercial vehicle while disqualified under the commercial motor vehicle safety act of 1986, title XII of Public Law 99-570, 100 Stat. 3207-170.

(4) If the secretary of state receives records of more than 1 conviction or civil infraction determination resulting from the same incident, all of the convictions or civil infraction determinations shall be treated as a single violation for purposes of extending the period of suspension or revocation under subsection (2) or (3).

(5) Before a person is arraigned before a district court magistrate or judge on a charge of violating this section, the arresting officer shall obtain the person's driving record from the secretary of state and shall furnish the record to the court. The driving record of the person may be obtained from the secretary of state's computer information network.

(6) This section does not apply to a person who operates a vehicle solely for the purpose of protecting human life or property if the life or property is endangered and summoning prompt aid is essential.

(7) A person whose vehicle group designation is suspended or revoked and who has been notified as provided in section 212 of that suspension or revocation, or whose application for a vehicle group designation has been denied as provided in this act, or who has never applied for a vehicle group designation and who operates a commercial motor vehicle within this state, except as permitted under this act, while any of those conditions exist is guilty of a misdemeanor punishable, except as otherwise provided in this section, by imprisonment for not less than 3 days or more than 90 days

or a fine of not more than $100.00, or both.

MI ST 257.212
M.C.L.A. 257.212

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 257. MOTOR VEHICLES
MICHIGAN VEHICLE CODE
CHAPTER II. ADMINISTRATION, REGISTRATION, CERTIFICATE OF TITLE AND ANTI-THEFT
IN GENERAL

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Current through P.A. 1998, No. 20

257.212. Notice; giving, mail, proof

Sec. 212. If the secretary of state is authorized or required to give notice under this act or other law regulating the operation of a vehicle, unless a different method of giving notice is otherwise expressly prescribed, notice shall be given either by personal delivery to the person to be notified or by deposit in the United States mail of the notice in an envelope with first class postage prepaid, addressed to the person at the address shown by the record of the secretary of state. The giving of notice by mail is complete upon the expiration of 5 days after the deposit of the notice. **Proof of the giving of notice in either manner may be made by the certificate of an officer or employee of the secretary of state or of a person 18 years of age or older, naming the person to whom notice was given and specifying the time, place, and manner of the giving of notice.**

U.S. Department of Justice
Civil Rights Division

Coordination and Review Section
P.O. Box 66560
Washington, DC 20035-6560

OCT 1, 1998

Mr. Duane Montgomery
1502 Harding
Detroit, Michigan 48214

RE: Complaint Number 171-37-0
Farmington Hills, Michigan Police Department

Dear Mr. Montgomery:

On July 1, 1998 the Coordination and Review Section (COR), Civil Rights Division, Department of Justice (DOJ) received your correspondence addressed to United States Senator, Spencer Abraham, alleging that officers of the Farmington Hills, Michigan Police Department (FHPD) have engaged in abuse of power, misconduct and racial discrimination. In particular, you contend that you were subjected to an unwarranted traffic stop, an illegal search and seizure of personal property, false arrest and were denied timely and appropriate medical care during your incarceration in the Farmington Hills Jail. In addition, you allege that the FHPD targets African American males for unwarranted traffic stops.

The Coordination and Review Section of the Civil Rights Division is responsible for coordinating the enforcement of Title VI of Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d et seq., and other civil rights statutes that relate to

programs and activities that receive Federal financial assistance. The Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. 3789(c), prohibits discrimination on the basis of race, color, national origin, sex or religion by recipients of assistance granted under that act, including grants provided through the Department's Officer of Justice Programs and the Office of Community Oriented Policing Services. COR also investigates complaints against recipients of financial assistance from DOJ. The Department's recipients include police and sheriffs' departments, State departments of corrections, courts, and other entities.

We have determined that the FHPD receives financial assistance from DOJ. Therefore, the antidiscrimination provisions of the Omnibus Crime Control and Safe Streets Act, as amended, 42 U.S.C. 3789d(c), apply. In addition, where there is a "pattern or practice" of police misconduct that violates the Constitution or federal law, the Department may file suit to obtain relief (42 U.S.C. §§ 14141, 3789d(c).

In order for us to determine whether we may proceed with an investigation of the issues you have raised in your complaint, we will need some additional information. Please fill out the enclosed Complaint Form and identify the incidents that have occurred. For each incident of alleged discrimination, please detail in writing the following: I) the date the incident occurred; ii) the names and phone numbers of all witnesses; iii) the names and phone numbers of any other victims you may be aware of who have been treated in this same discriminatory manner; iv) why you believe the police officers' actions were discriminatory; and, v) any other pertinent information which may aid us in the administrative review of your complaint. Please provide a phone number where you can be reached during business hours.

Your correspondence indicates that you have filed a

lawsuit involving these issues in Federal District Court. Please be aware that COR may elect to suspend any investigation of this matter pending the disposition of the court proceedings.

We have enclosed two copies of our Complainant Consent Release Form concerning the Freedom of Information Act and the Privacy Act. Please read it, sign it, and return one copy to my office at the address provided on the Form. You may retain the other copy for your records. If we do not receive your signed Complaint and Consent Form within 30 days of the date of this letter, we will close our files in regard to your case and notify you accordingly.

Please direct any written correspondence regarding this matter to Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66560, Washington, D.C., 20035-6560, and reference the complaint number cited above.

Sincerely,

signed Merrily A. Friedlander
Merrily A. Friedlander
Chief
Coordination and Review Section
Civil Rights Division

Enclosures

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUANE MONTGOMERY, CASE NO.:98-CV-71530-DT
HON. PATRICK J. DUGGAN

Plaintiff,

vs.

PEOPLE OF THE
STATE OF MICHIGAN,
COUNTY OF OAKLAND,

Defendants.
_____/

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on May 11, 1998.

Plaintiff submitted this petition for writ of habeas corpus to the United States Court of Appeals for the Sixth Circuit. Since it was not a pleading that should properly be filed with the Court of Appeals, the Court of Appeals sent the case to be filed in the District Court.

This petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 was filed in this Court on April 8, 1998.

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides:

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.

The petition filed by petitioner is labeled, "Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody." Plaintiff is not "a person in state custody."

28 U.S.C. § 2254(a) permits, "an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States."

Plaintiff's "petition for writ of habeas corpus" does not allege that he is a person in state custody (because in fact he is not), nor does it seek any relief to which a person may be entitled under § 2254.

This petition simply challenges the Court's ruling setting

aside a default judgment. Such relief is not available in a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Therefore, since "it plainly appears from the face of the petition"... that the petitioner is not entitled to relief in the District Court,

IT IS ORDERED that the petition for writ of habeas corpus is hereby **DISMISSED**.

Stamped PATRICK DUGGAN
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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